

**THE HOMOSEXUAL LAW AND POLICY IN THE MILITARY:
“DON’T ASK, DON’T TELL,
DON’T PURSUE, DON’T HARASS” . . .
DON’T BE ABSURD!**

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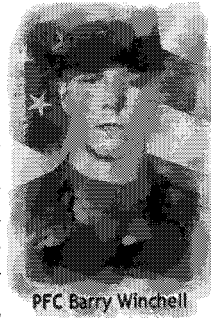
I. INTRODUCTION

Army Private First Class (PFC) Barry Winchell was born in August 1977 and died on July 6, 1999, at the age of twenty-one.¹ He was murdered by an Army soldier after months of harassment from his fellow company members for being a suspected homosexual.²

1. See, e.g., Editorial, *For Love of Country*, S.F. CHRON., July 21, 2000, at A20; Thomas Hackett, *The Execution of Pvt. Barry Winchell: The Real Story Behind the "Don't Ask, Don't Tell" Murder*, ROLLING STONE, Mar. 2, 2000, at 80, 88 (indicating Barry Winchell's anticipation of his twenty-second birthday in late August), available at <http://www.gaymilitary.org/rolstobarry.htm>; Press Release, Major Pamela Hart, 101st Airborne Division (Air Assault) and Fort Campbell Public Affairs Office, Memorial Service (July 8, 1999) (on file with author); Press Release, Major Pamela Hart, 101st Airborne Division (Air Assault) and Fort Campbell Public Affairs Office, Soldier Dies from Injuries (July 7, 1999) (on file with author) [hereinafter Soldier Dies from Injuries Press Release] (stating PFC Winchell's death occurred at 9 a.m. on July 6, 1999); PlanetOut News Staff, *2nd Winchell Suspect Pleads*, Jan. 10, 2000, at <http://www.planetout.com/news/article.html?2000/01/10/1> (on file with author).

2. See, e.g., FORT CAMPBELL TASK FORCE, DEP'T OF THE ARMY INSPECTOR GEN., DAIG SPECIAL ASSESSMENT / INVESTIGATION OF ALLEGATIONS OF VIOLATIONS OF THE DOD HOMOSEXUAL CONDUCT POLICY AT FORT CAMPBELL 2-1 (2000) (reporting in May 1999 there had been several months of rumors regarding Winchell's homosexuality), available at <http://www.army.mil/ig/> (July 2000); Hackett, *supra* note 1, at 81; Steve Ralls, *Soldier Will Serve Only Eleven and One-Half Years for Role in Murder of Soldier Perceived as Gay*, Jan. 8, 2000, at <http://www.sldn.org/templates/press/record.html?section=2&record=99> (on file with author).

PFC Winchell joined the United States Army in October 1997, and soon became assigned to the 101st Airborne at Fort Campbell, Kentucky.³ Beginning in May of 1999, his fellow soldiers mocked him for being a "dreaded" homosexual.⁴ The main thrust of their gibes centered on PFC Winchell's relationship with a Gulf War veteran who showcased as a drag queen in a local nightclub.⁵ Ironically, Winchell's primary tormentor was the person who introduced him to the gay bar scene in Nashville.⁶ This instigator was also his



PFC Barry Winchell ‡

roommate, Specialist Justin Fisher, who had a reputation as the company's jokester and troublemaker.⁷ Fisher's persecution of Winchell went beyond mere verbal harassment; during one altercation, a fight about who should clean the room, Fisher hit Winchell with a dustpan.⁸ Winchell's bloody head wound required several stitches.⁹ Shortly thereafter, with Fisher's encouragement, a majority of the soldiers in Delta Company

‡ Photograph provided courtesy of Steve Ralls, Servicemembers Legal Defense Network, with permission of Mrs. Patricia Kutteles, Private First Class Winchell's mother.

3. See, e.g., Hackett, *supra* note 1, at 81; Mark Thompson, "Why Do People Have To Push Me Like That?": The Torment and Murder of a Gay Soldier Cast a Harsh Light on the Practice of "Don't Ask, Don't Tell," *TIME*, Dec. 13, 1999, at 56, 56; Soldier Dies from Injuries Press Release, *supra* note 1.

4. See, e.g., FORT CAMPBELL TASK FORCE, DEP'T OF THE ARMY INSPECTOR GEN., *supra* note 2, at 2-1 (finding that rumors started in May 1999); Hackett, *supra* note 1, at 82.

5. See, e.g., Francis X. Clines, *Mother Sees No End to Ordeal in Slaying*, *N.Y. TIMES*, Jan. 10, 2000, at A13 (describing Winchell's relationship to a Navy veteran who had undergone a sex change operation and showcased as a dancer in a Nashville nightclub); Hackett, *supra* note 1, at 82.

6. See, e.g., Clines, *supra* note 5 (stating Fisher was the first person to take Winchell to the gay club); Steven Lee Myers, *Army To Expand Inquiry in Death of Gay*, *N.Y. TIMES*, Jan. 10, 2000, at A13 (testifying Fisher was the one who instigated rumors about Winchell's homosexual orientation after introducing him to a transvestite bar in Nashville, Tennessee); PlanetOut News Staff, *supra* note 1 (naming Fisher as the one who spread rumors that Winchell was a homosexual after taking him to a gay club in Nashville, Tennessee).

7. See Hackett, *supra* note 1, at 82; Ralls, *supra* note 2. Testimony during Glover's court-martial named Fisher as the lead in taunting Winchell about his sexual orientation. See Hackett, *supra* note 1, at 82; Ralls, *supra* note 2.

8. See Hackett, *supra* note 1, at 82; see also *Army Private Guilty in Murder of Fellow Soldier*, *WASH. POST*, Dec. 9, 1999, at A09; James Prichard, "Don't Ask" Policy Hit After Soldier Convicted, *CHATTANOOGA TIMES & FREE PRESS*, Dec. 10, 1999, at A15; James Prichard, *Fort Campbell Soldier Found Guilty of Murder*, *CHATTANOOGA TIMES & FREE PRESS*, Dec. 9, 1999, at A2.

9. See *Army Private Guilty in Murder of Fellow Soldier*, *supra* note 8; Hackett, *supra* note 1, at 82; Prichard, "Don't Ask" Policy Hit After Soldier Convicted, *supra* note 8; Prichard, *Fort Campbell Soldier Found Guilty of Murder*, *supra* note 8.

(almost ninety in all) called Winchell a "faggot" on a daily basis.¹⁰ In April 1999, Winchell complained to his commander, Captain Daniel Rouse, but the officer's orders to his troops to "knock that s**t¹¹ off"¹² and counseling¹³ of Winchell's head sergeant proved ineffective.¹⁴ The military took no other disciplinary action, and Winchell made no further attempts to contact his superiors regarding the harassment.¹⁵

10. See, e.g., Hackett, *supra* note 1, at 86; Myers, *supra* note 6 (announcing that trial testimony revealed Private Winchell endured daily harassment and taunting through anti-homosexual slurs); Thompson, *supra* note 3, at 57.

11. Expletive deleted.

12. Hackett, *supra* note 1, at 86; FORT CAMPBELL TASK FORCE, DEP'T OF THE ARMY INSPECTOR GEN., *supra* note 2, at 2-2.

13. After the head sergeant called PFC Winchell a "faggot," the company commander counseled him concerning his inappropriate remarks. See FORT CAMPBELL TASK FORCE, DEP'T OF THE ARMY INSPECTOR GEN., *supra* note 2, at ES-3, 2-4; Thomas E. Ricks, *Pentagon Vows To Enforce 'Don't Ask; Training Program Is Planned To Ease Harassment of Gays*, WASH. POST, July 22, 2000, at A01. When a military member is called into a superior's office to explain oneself and receive "training," it is sometimes referred to as "counseling." When "called onto the carpet," the counseling session could involve anything from a brief admonition to a full-blown training session where the lower-ranking members are made to stand at attention with their chins in and elbows pinned as the superior comes nose to nose and expresses (yells) his disappointment in the others' performance with well-chosen words. Each counseling session is tailored for the individual's needs. The Army's leadership manual suggests that stressful situations help the subordinate prepare for combat stress and some subordinates need gentle suggestions, while others need "the verbal equivalent of a kick in the pants." HEADQUARTERS, DEP'T OF THE ARMY, FIELD MANUAL NO. 22-100, ARMY LEADERSHIP: BE, KNOW, DO 3-7, 3-15, C-13 (1999). See generally *Leadership and Counseling* (defining counseling as "a process of listening, communicating advice, instruction, or judgment with the intent of influencing a person's attitude or behavior"), at <http://www.military-net.com/education/mpdlead.html> (last visited Mar. 12, 2001) (on file with author).

14. See Steve Ralls, *Military Panel Finds Ft. Campbell Soldier Guilty of Premeditated Murder in Murder of Soldier Perceived as Gay*, Dec. 8, 1999 (recounting testimony that Winchell's command failed to stop the harassment), at <http://www.sldn.org> (on file with author); see also FORT CAMPBELL TASK FORCE, DEP'T OF THE ARMY INSPECTOR GEN., *supra* note 2, at ES-3, 2-2, 2-4 (reporting the company commander never informed Winchell of the remedial measures taken, no Army agencies performed follow-up actions to Winchell's complaint and soldiers continued to call Winchell a "faggot"); Eric Resnick, *No Officers To Blame for Winchell's Murder, Report Says*, July 21, 2000 (reporting the Army considers the first sergeant's lack of training regarding harassment was the cause of Winchell's death), at <http://www.gaypeopleschronicle.com/stories/00jul21.htm> (on file with author).

15. See, e.g., Francis X. Clines, *For Gay Soldier, a Daily Barrage of Threats and Slurs*, N.Y. TIMES, Dec. 8, 1999, § 1, at 33 (recounting the fruitless effort to complain which did not stop the harassment); Hackett, *supra* note 1, at 86; Ralls, *supra* note 14 (finding that after Winchell's commanders failed to stop the harassment, Winchell was unaware of where to turn for assistance); see also FORT CAMPBELL TASK FORCE, DEP'T OF THE ARMY INSPECTOR GEN., *supra* note 2, at 2-4 to 2-5 (claiming that since Winchell made no further

The daily discrimination and threats culminated in a clash with Private Calvin Glover, a soldier who idolized Fisher's charismatic masculinity and who desperately wanted to be accepted.¹⁶ One Saturday night, during an Independence Day weekend picnic, Private Winchell confronted Glover and urged him to stop telling his egotistical stories, but Fisher continued to encourage Glover's bravado.¹⁷ As a result of this challenge, drunken tempers flared and a fistfight between Winchell and Glover ensued.¹⁸ Much to Glover's embarrassment, Private Winchell won the struggle.¹⁹ The company "faggot" physically besting the company loudmouth fascinated the on-looking soldiers.²⁰ Winchell, however, appeared remorseful and attempted to mend his strained relationship with Glover.²¹ Meanwhile, Fisher would not let Glover forget his humiliating defeat and repeatedly teased Glover about it.²²

What took place next is a shocking display of how the homosexual policy in the military does not succeed in punishing a homosexual simply for conduct, but creates an atmosphere of intolerance that leads to discrimination against suspected homosexuals without any proof of "illegal" conduct.²³ This atmosphere of intolerance was tragically illustrated when Glover, the soldier who lost to a "fag" in a fistfight, approached Winchell's cot as he slept.²⁴ With encouragement from Fisher, Glover vio-

complaints, the Army Inspector General was not required to investigate and the presumption was Winchell's commander had redressed the grievance).

16. See Clines, *supra* note 15 (recounting comments by Glover's parents that he succumbed to peer pressure because he wanted to belong); Hackett, *supra* note 1, at 88; Chris Poynter, *Killer of Gay GI Gets Life Sentence: Army Jury Leaves Soldier with Hope*, *COURIER-JOURNAL* (Louisville, Ky.), Dec. 10, 1999, at 01a (repeating testimony of a military psychologist that Glover has low self-esteem and is easily influenced because he wants attention). See generally Poynter, *supra* (contradicting earlier testimony that Glover was a racist and homophobic by recalling Glover's friendship with an openly homosexual boy when he was younger).

17. See, e.g., Hackett, *supra* note 1, at 88; Thompson, *supra* note 3, at 56 (describing Glover's stories as outrageous and untrue bragging); PlanetOut News Staff, *supra* note 1 (admitting Fisher had provoked Glover into starting the altercation).

18. See, e.g., *For Love of Country*, *supra* note 1; Hackett, *supra* note 1, at 88; PlanetOut News Staff, *supra* note 1 (stating Glover started the fight).

19. See, e.g., *For Love of Country*, *supra* note 1; Hackett, *supra* note 1, at 88; PlanetOut News Staff, *supra* note 1 (recounting Winchell won the fight handily).

20. See Hackett, *supra* note 1, at 88; PlanetOut News Staff, *supra* note 1 (reporting Fisher teased Glover following the fight about being bested by a homosexual).

21. See Hackett, *supra* note 1, at 88, 108.

22. See Clines, *supra* note 15; Juliet Eilperin, *Parents of Slain GI Consider Suing Army*, *WASH. POST*, Jan. 10, 2000, at A02, available at 2000 WL 2279172.

23. See generally 10 U.S.C. § 654 (1994) (codifying the military's homosexual policy).

24. See, e.g., *For Love of Country*, *supra* note 1 (stating the tragedy that "Winchell went to sleep, but never awakened"); Hackett, *supra* note 1, at 108; see also Poynter, *supra* note 16 (declaring Glover's assertion that Fisher encouraged the attack).

lently beat Winchell's head with a baseball bat until Winchell's brain seeped from his cracked skull, blood streamed from his left ear, and his brain hemorrhaged, turning his eye sockets black.²⁵

In light of this brutal murder, Winchell's mother blames the mindset of the Army as a major contributor to her son's death.²⁶ The discrepancy in the treatment of one group over another is evident: on the one hand, the Army permitted soldiers to call a man a "faggot" on a daily basis, and everybody laughed;²⁷ on the other hand, the Army forbids use of the derogatory term "nigger," and using this racially discriminatory term results in immediate disciplinary action.²⁸ As tragic as it seems, the military's homosexual policy contributes to this atmosphere against gays and lesbians in the service. Although Private Winchell's killing was the most recent highly-publicized violent murder of a soldier precipitated because of his sexual orientation,²⁹ it was not the first,³⁰ and probably will not be the

25. See, e.g., Hackett, *supra* note 1, at 108; Thompson, *supra* note 3, at 57; PlanetOut News Staff, *supra* note 1; Resnick, *supra* note 14 (reporting the cause of Winchell's death as strikes from a baseball bat during his sleep after four months of harassment).

26. See, e.g., Clines, *supra* note 5; Hackett, *supra* note 1, at 108; Mary Sanchez, *Parents Become Reluctant Activists After Son's Beating Death in Army*, KAN. CITY STAR, Mar. 15, 2000, at K0674, available at <http://www.kcstar.com/newslibrary/search.html>.

27. See Hackett, *supra* note 1, at 108.

28. See *id.*

29. See, e.g., Press Release, Major Pamela Hart, 101st Airborne Division (Air Assault) and Fort Campbell Public Affairs Office, Tentative Hearing Date Set (Aug. 4, 1999) (on file with author) (indicating the packet of maps and other information distributed to the media); Press Release, Major Pamela Hart, 101st Airborne Division (Air Assault) and Fort Campbell Public Affairs Office, Article 32 Hearing Set for Second Accused Soldier (Aug. 26, 1999) (on file with author) (supplying more information to the media including ground rules and confirmation of attendance). It should be noted that other factors could have contributed to Winchell's death besides the military's homosexual policy. See *Don't Retreat*, NAT'L REV., Jan. 24, 2000, at 13 (listing the responsibility for Winchell's murder lying with the murderer and a lack of unit discipline, with minimal influence from the military's ban on open homosexuals serving), available at 2000 WL 11593480. An investigative task force found deficiencies in the living quarters, lack of leaders managing and enforcing policy in the barracks, non-existent command presence in the dormitories, and alcohol abuse and underage drinking. See FORT CAMPBELL TASK FORCE, DEP'T OF THE ARMY INSPECTOR GEN., *supra* note 2, at 2-10 to 2-11; Clines, *supra* note 15.

As a result of Winchell's murder, the Army convicted two of Winchell's fellow soldiers, Private Glover and Specialist Fisher, for his death. See Mary Sanchez, *Officials Meet with Slain Soldier's Parents*, KAN. CITY STAR, July 28, 2000, at B3. Fisher was originally charged with being a principal to premeditated murder, being an accessory after the fact, making false statements under oath to an investigating officer and obstructing the investigation. See, e.g., Press Release, Major Pamela Hart, 101st Airborne Division (Air Assault) and Fort Campbell Public Affairs Office, Fisher Arraigned (Nov. 23, 1999) (on file with author); Press Release, Major Pamela Hart, 101st Airborne Division (Air Assault) and Fort Campbell Public Affairs Office, Second Soldier Charged in Murder Case, (July 19, 1999) (on file with author); Ralls, *supra* note 2. Fisher was ultimately sentenced to fourteen years

last. While the military policy only condemns homosexual conduct and not homosexual status alone, the atmosphere of the military simply does not tolerate homosexuals.³¹

Winchell's murder graphically illustrates how the military's current homosexual law and policy (commonly referred to as "Don't Ask, Don't Tell, Don't Pursue, Don't Harass"³²) fails to serve its intended purpose.³³

for obstructing justice, making false statements under oath and providing alcohol to a minor. See, e.g., Press Release, Major Pamela Hart, 101st Airborne Division (Air Assault) and Fort Campbell Public Affairs Office, Fisher Found Guilty (Jan. 8, 2000) (on file with author) [hereinafter Fisher Found Guilty Press Release]; Ralls, *supra* note 2 (describing how Fisher had a plea agreement that capped his sentence at twelve and one-half years, and taking into account reductions in his sentence due to good behavior, Fisher would serve only eleven and one-half years of jail time). Private Glover, however, was convicted of premeditated murder and sentenced to life in military prison. See, e.g., Fisher Found Guilty Press Release, *supra*; Ralls, *supra* note 14.

In the aftermath of the court-martial trials, Winchell's parents filed a wrongful death claim against the Army. This \$1.8 million suit was denied in September 2000, on the basis that there is no legal support for the claim. See *Slain Soldier's Mom Denied Death Claim*, OMAHA WORLD-HERALD, Sept. 30, 2000, at NEWS8.

30. See Hackett, *supra* note 1, at 86. Another military homosexual murder took place in 1992 when fellow sailors beat Seaman Allen Schindler to death in Japan near a United States Naval installation. See NAT'L DEF. RESEARCH INST., RAND, MR-323-OSD, SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY: OPTIONS AND ASSESSMENT 272 (1993); Hackett, *supra* note 1, at 86. Schindler's injuries included broken ribs, a fractured skull, broken nose, broken jaw, pulverized liver, torn aorta, ripped bladder and a face beaten so badly that he could only be identified by the tattoos on his arms. See Hackett, *supra* note 1, at 86.

31. See 10 U.S.C. § 654 (1994); see also *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Comm. on Armed Servs. U.S. S.*, 103d Cong. 702 (1994) [hereinafter *Senate Hearings*] (statement of Hon. Les Aspin, Sec'y of Def.) (emphasizing "[u]nder the new policy, sexual orientation alone will not bar a person or individuals from service unless it involves homosexual conduct").

32. The law passed by Congress includes the "Don't Ask" and "Don't Tell" elements. See generally 10 U.S.C. § 654; E-mail from John R. Brancato, Colonel, U.S. Air Force (Retired), to Debra A. Luker, Law Student, St. Mary's University (Mar. 21, 2001, 04:31:00 CST) (on file with author). The "Don't Pursue" and "Don't Harass" portions are from guideline policies distributed after "Don't Ask, Don't Tell" became law. See Brancato, *supra*. The "Don't Harass" portion of the policy was re-emphasized and added to the title of the policy as a result of Winchell's death. See Memorandum from Rudy de Leon, Under Secretary of Defense (Personnel and Readiness), to Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff and Inspector General of the Department of Defense, Guidelines for Investigating Threats Against or Harassment of Service Members Based on Alleged Homosexuality (Aug. 12, 1999), available at <http://dont.stanford.edu/regulations/memo1.htm> (on file with author).

33. See JANET E. HALLEY, DON'T: A READER'S GUIDE TO THE MILITARY'S ANTI-GAY POLICY 1 (Pub. Planet Book Series, Dilip Gaonkar et al. eds., 1999) (stating how the American public interprets the military's current homosexual policy as discharging servicemembers for their conduct and not their status as a homosexual, but this is not true in its actual application); see also FORT CAMPBELL TASK FORCE, DEPT OF THE ARMY IN-

Congress intended to bar military service from those who manifest their sexual orientation with homosexual *conduct*, not to prohibit people from serving in the military based on their sexual *orientation*.³⁴

The "Don't Ask, Don't Tell" law instructs that a military member will be separated³⁵ from service if he or she: "(1) . . . has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts . . . (2) . . . stated that he or she is a homosexual . . . [or] (3) . . . married or attempted to marry a person known to be of the same biologi-

SPECTOR GEN., *supra* note 2, at 2-39 (recognizing that referring to the military's homosexual policy with the sound bite "Don't Ask, Don't Tell" without thorough explanation of the policy increases confusion about what conduct is allowed).

One way the military should have shown its support for a fallen comrade, regardless of sexual orientation, is by paying respect to Private Winchell's family: by coming to their house in uniform, rather than civilian clothes in a July 2000 visit. *See Sanchez, supra* note 29. When officers reported to Winchell's parents the results of the investigation of their son's death (to inform his parents that no superiors were found at fault for Private Winchell's murder), the individuals wore civilian clothes rather than dress uniform. *See id.* This could be construed as the military not caring enough for a murdered homosexual to pay their respects with proper military decorum. Wearing of the military uniform is appropriate except during demonstrations, political activities, private employment, commercial interest activities, public appearances that imply Service sanction when it has not been Service approved and at times when there would be discredit upon the Armed Forces. *See ASSISTANT SEC'y OF DEF. (MANPOWER & RESERVE AFFAIRS), DEP'T OF DEF., DEP'T OF DEF. DIRECTIVE NO. 1334.1, WEARING OF THE UNIFORM § 3.1 (1969).* Alternatively, it is possible the military members wore civilian attire because they were granted permission to not wear their uniform while on duty or because they were attending a picnic. *See HEADQUARTERS, DEP'T OF THE ARMY, ARMY REGULATION NO. 670-1, WEAR AND APPEARANCE OF ARMY UNIFORMS AND INSIGNIA 3 (1992) [hereinafter ARMY REGULATION NO. 670-1]* (allowing civilian clothing for mission reasons and when participating in civilian outdoor activities); *Sanchez, supra* note 29 (describing the three hour meeting over barbeque between Winchell's parents and Army officials). Whenever a supervisor visits a dead soldier's parents, though, it seems appropriate to at least wear the military equivalent of a civilian business suit when it deals with official findings of the death. *See generally ARMY REGULATION NO. 670-1, supra*, at 162 (comparing a civilian business suit to the Army uniform); *Sanchez, supra* note 29 (reporting the military officials visited Winchell's parents to announce the Army found no officers responsible in Winchell's murder).

34. *See Senate Hearings, supra* note 31, at 702 (statement of Hon. Les Aspin, Sec'y of Def.); *see also* FORT CAMPBELL TASK FORCE, DEP'T OF THE ARMY INSPECTOR GEN., *supra* note 2, at ES-2. The distinction between *conduct* and *orientation* is important: a person with homosexual tendencies who does not act upon those tendencies has exhibited a homosexual *orientation*, but not homosexual *conduct*. *See Senate Hearings, supra* note 31, at 702 (statement of Hon. Les Aspin, Sec'y of Def.). The law passed by Congress only expressly prohibits the latter. *See* 10 U.S.C. § 654.

35. "Separation" is defined as "a general term that includes discharge, release from active duty, release from custody and control of the armed forces, transfer to the IRR [Individual Ready Reserve], and similar changes in active or reserve status." Enlisted Administrative Separations, 32 C.F.R. § 41 app. A at 130 (1993).

cal sex.”³⁶ The overall purpose of the policy is not to create a flat prohibition of all homosexuals serving in the military, but only forbid service

36. 10 U.S.C. § 654. The law includes (a) Congressional findings which are the justifications for the law, (b) the homosexual conduct that compels mandatory separation, (c) & (d) required initial training for recruits and periodic refreshers, (e) exceptions to the requirement of mandatory separation and (f) the definitions of “homosexual,” “bisexual” and “homosexual act.” *See id.* The homosexual law in the military is included in its entirety below (any ellipses printed below are also contained in the actual law):

§ 654. Policy concerning homosexuality in the armed forces . . .

(a) FINDINGS. Congress makes the following findings:

(1) Section 8 of article I of the Constitution of the United States commits exclusively to the Congress the powers to raise and support armies, provide and maintain a Navy, and make rules for the government and regulation of the land and naval forces.

(2) There is no constitutional right to serve in the armed forces.

(3) Pursuant to the powers conferred by section 8 of article I of the Constitution of the United States, it lies within the discretion of the Congress to establish qualifications for and conditions of service in the armed forces.

(4) The primary purpose of the armed forces is to prepare for and to prevail in combat should the need arise.

(5) The conduct of military operations requires members of the armed forces to make extraordinary sacrifices, including the ultimate sacrifice, in order to provide for the common defense.

(6) Success in combat requires military units that are characterized by high morale, good order and discipline, and unit cohesion.

(7) One of the most critical elements in combat capability is unit cohesion, that is, the bonds of trust among individual service members that make the combat effectiveness of a military unit greater than the sum of the combat effectiveness of the individual unit members.

(8) Military life is fundamentally different from civilian life in that—

(A) the extraordinary responsibilities of the armed forces, the unique conditions of military service, and the critical role of unit cohesion, require that the military community, while subject to civilian control, exist as a specialized society; and

(B) the military society is characterized by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior, that would not be acceptable in civilian society.

(9) The standards of conduct for members of the armed forces regulate a member's life for 24 hours each day beginning at the moment the member enters military status and not ending until that person is discharged or otherwise separated from the armed forces.

(10) Those standards of conduct, including the Uniform Code of Military Justice, apply to a member of the armed forces at all times that the member has a military status, whether the member is on base or off base, and whether the member is on duty or off duty.

(11) The pervasive application of the standards of conduct is necessary because members of the armed forces must be ready at all times for worldwide deployment to a combat environment.

(12) The worldwide deployment of United States military forces, the international responsibilities of the United States, and the potential for involvement of the armed forces in actual combat routinely make it necessary for members of the armed forces

by members who engage in homosexual conduct or state they are homo-

involuntarily to accept living conditions and working conditions that are often spartan, primitive, and characterized by forced intimacy with little or no privacy.

(13) The prohibition against homosexual conduct is a longstanding element of military law that continues to be necessary in the unique circumstances of military service.

(14) The armed forces must maintain personnel policies that exclude persons whose presence in the armed forces would create an unacceptable risk to the armed forces' high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

(15) The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

(b) **POLICY.** A member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made and approved in accordance with procedures set forth in such regulations:

(1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are further findings, made and approved in accordance with procedures set forth in such regulations, that the member has demonstrated that—

(A) such conduct is a departure from the member's usual and customary behavior;

(B) such conduct, under all the circumstances, is unlikely to recur;

(C) such conduct was not accomplished by use of force, coercion, or intimidation;

(D) under the particular circumstances of the case, the member's continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale; and

(E) the member does not have a propensity or intent to engage in homosexual acts.

(2) That the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

(3) That the member has married or attempted to marry a person known to be of the same biological sex.

(c) **ENTRY STANDARDS AND DOCUMENTS.**

(1) The Secretary of Defense shall ensure that the standards for enlistment and appointment of members of the armed forces reflect the policies set forth in subsection (b).

(2) The documents used to effectuate the enlistment or appointment of a person as a member of the armed forces shall set forth the provisions of subsection (b).

(d) **REQUIRED BRIEFINGS.** The briefings that members of the armed forces receive upon entry into the armed forces and periodically thereafter under section 937 of this title (article 137 of the Uniform Code of Military Justice) shall include a detailed explanation of the applicable laws and regulations governing sexual conduct by members of the armed forces, including the policies prescribed under subsection (b).

sexuals.³⁷ In fact, the Department of Defense (DoD) holds that the homosexual policy does not bar individuals from military service based on their homosexual orientation.³⁸ Instead, homosexual conduct itself is the cause for discharge, and simply stating that one is a homosexual constitutes homosexual conduct.³⁹ Thus, homosexual conduct is (1) engaging in homosexual acts, (2) stating oneself is homosexual or (3) marrying a person of the same sex.⁴⁰ The justifications for the ban against homosexuals in the military apply regardless of the level of homosexual activity in which the member engages.⁴¹

General H. Norman Schwarzkopf, United States Army (retired), agrees that lifting the ban on homosexuals serving in the military, yet retaining a prohibition on homosexual conduct, is confusing—it destroys the unit cohesion necessary in a fighting division and essentially ties the

(e) RULE OF CONSTRUCTION. Nothing in subsection (b) shall be construed to require that a member of the armed forces be processed for separation from the armed forces when a determination is made in accordance with regulations prescribed by the Secretary of Defense that—

(1) the member engaged in conduct or made statements for the purpose of avoiding or terminating military service; and

(2) separation of the member would not be in the best interest of the armed forces.

(f) DEFINITIONS. In this section:

(1) The term “homosexual” means a person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts, and includes the terms “gay” and “lesbian”.

(2) The term “bisexual” means a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual and heterosexual acts.

(3) The term “homosexual act” means—

(A) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and

(B) any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (A).

Id.

37. See *id.*; see also *Richenberg v. Perry*, 97 F.3d 256, 261 (8th Cir. 1996). The court held “[t]he DOD [sic] Directive explicitly states that the military will not exclude servicemembers for their homosexual thoughts, opinions, fantasies, or orientation.” *Richenberg*, 97 F.3d at 261.

38. See Staff Sgt. Alicia K. Borlik, U.S. Army, Cohen Accepts Revisions to Homosexual Policy, Apr. 23, 1998, at http://www.defenselink.mil/news/Apr1998/n04231998_9804231.html (on file with author).

39. See *id.*

40. See 10 U.S.C. § 654(b).

41. See *Rich v. Sec’y of the Army*, 735 F.2d 1220, 1224 (10th Cir. 1984) (holding that an admission of homosexuality absent any evidence of homosexual conduct is sufficient to justify the servicemember’s discharge).

military commanders' hands on what they can and cannot investigate.⁴² In this regard, since the military thrives on precise and specific guidelines, the Department of Defense finds commanders and military lawyers have difficulty clarifying and interpreting the current policy.⁴³ For example, in a hearing involving a servicemember who denied an intent to engage in homosexual acts, the first board recommended separation, while the second board, which made findings based on the first board's record, recommended retention.⁴⁴ Opponents predicted these inconsistent rulings when the military first introduced the "Don't Ask, Don't Tell" legislation; they immediately recognized the door was opening for increased litigation along a "slippery slope."⁴⁵

The fundamental means by which to correct the ambiguity in the current "Don't Ask, Don't Tell" law is to abolish the ban on homosexuals.⁴⁶ Homosexuals should not receive special treatment, but merely the same opportunity to serve their country.⁴⁷ Furthermore, the ban on homosexuals needs to be eradicated to allow the United States military to recruit

42. See 139 CONG. REC. 16,591-92 (1993) (referring to a television advertisement sponsored by the American Security Council which included retired General Schwarzkopf's protests against homosexuals being allowed into the military).

43. See HALLEY, *supra* note 33, at 53, 106 (detailing confusing interpretation by President Clinton and highlighting some of the Congressional concerns about the policy's ambiguity and lack of particularity).

44. See *id.* at 103; Ricks, *supra* note 13 (establishing the military is uncomfortable with the policy because it is purposefully ambiguous).

45. See 139 CONG. REC. 13,623 (1993). Representative Dornan itemized the disparity between making a new military recruit sign a statement acknowledging that homosexuality is incompatible with military service, yet not asking the new recruit whether or not they are a homosexual. See *id.*

46. See generally Mary Sanchez, *Military's Lack of Acceptance of Gays Anchored in History*, KAN. CITY STAR, Apr. 2, 2000, at A7 (proposing the current policy is the biggest problem because it advocates a double standard); Robbie Sherwood & Dennis Camire, *May's Case Won't Change Army Policy*, ARIZ. REPUBLIC (Phoenix), Jan. 17, 2001, at B1 (quoting Arizona Congressman Jim Kolbe, "They should abolish the 'Don't Ask, Don't Tell' rule").

47. See Remarks at the Children's Town Meeting, February 20, 1993, 1 PUB. PAPERS 154, (1993) (promoting President Clinton's vision that society will "simply . . . accept other people as people and give them a chance to be citizens as long as they're not doing anything wrong"); see also Question-and-Answer Session with the Cleveland City Club, May 10, 1993, 1 PUB. PAPERS 610 (1993) (reiterating that people should be allowed to serve their country unless they violate the code of military conduct); Remarks Announcing the New Policy on Homosexuals in the Military, July 19, 1993, 1 PUB. PAPERS 1110 (1993) (announcing individuals should be allowed to serve their country if they conform to the military's standards of conduct). See generally Human Rights Campaign, *Mission Statement* (working for equal rights, non-discrimination, uniformity in the laws and fairness, while prohibiting quotas), at <http://www.hrc.org/hrc/mission.html> (last visited Feb. 28, 2001) (on file with author); Straight But Not Narrow, *Straight People Working for Equal Rights for All* (encouraging heterosexuals to advocate equal rights regardless of sexual orienta-

properly, train effectively and retain the most qualified servicemembers.⁴⁸ Instead of discriminating based on sexual orientation, national defense should be the number one priority.⁴⁹ While the current policy has moved toward equal opportunities by easing the restrictions on homosexual military service, it has not fully eliminated the ban.

This comment will focus on the reasons for modifying the homosexual law and policy in the United States military to allow homosexuals to serve openly in the military, yet hold them to the same performance standards as heterosexual servicemembers.⁵⁰ Part II examines the history of the

tion), at <http://www.disleeksea.home.mindspring.com/sbnn.html> (last modified Mar. 12, 1999) (on file with author).

48. See *60 Minutes: 'Don't Ask, Don't Tell' Policy Comes Under Fire* (CBS News television broadcast, June 25, 2000) (noting the shortage in military recruitment is only amplified by the discharge of three to four military members per day for being homosexuals), available at 2000 WL 4212925.

49. See, e.g., 10 U.S.C. § 654(a)(4) (1994) (asserting the military's primary purpose is training for and winning in combat); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955) (differentiating the primary business of the military as fighting wars should the need arise); *Assessment of the Plan To Lift the Ban on Homosexuals in the Military: Hearings Before the Military Forces and Pers. Subcomm. of the Comm. on Armed Servs. H.R.*, 103d Cong. 31 (1994) [hereinafter *House of Representatives Hearings*] (statement of Gen. Colin Powell, Chairman, Joint Chiefs of Staff: "We exist to fight the Nation's wars"); Remarks Announcing the New Policy on Homosexuals in the Military, July 19, 1993, *supra* note 47, at 1109 (intoning the highest priority is that the military is ready to fight); Lee Anderson, *Bush for Strong Military Defenses*, CHATTANOOGA TIMES, Aug. 23, 2000, at B11 (discussing how President Clinton has reduced the military's effectiveness, and national defense should be the main goal of government).

50. This comment attacks the validity of the justifications for the "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" policy in light of the apparent ambiguities in the current policy, the similarity to justifications for excluding African Americans from the military before 1948 and recent changes to foreign military policies. For discussions of the constitutional issues inherent in the military's homosexual policy, please refer to the multitude of other sources available, as these constitutional implications will only be lightly touched upon in this comment. See generally Diane H. Mazur, *Re-Making Distinctions on the Basis of Sex: Must Gay Women Be Admitted to the Military Even If Gay Men Are Not?*, 58 OHIO ST. L.J. 953 (1997) (exploring the equal protection implications of the homosexual policy based on the servicemember's gender); David A. Schlueter, *Gays and Lesbians in the Military: A Rationally Based Solution to a Legal Rubik's Cube*, 29 WAKE FOREST L. REV. 393, 407-419 (1994) (presenting the differences in constitutional protections for servicemembers and the constitutional issues raised by the "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" policy); Mark Strasser, *Unconstitutional? Don't Ask; If It Is, Don't Tell: On Deference, Rationality, and the Constitution*, 66 U. COLO. L. REV. 375 (1995) (exploring several constitutional issues including the separation of powers doctrine, First and Fourteenth Amendment problems and the question of national security); Kenneth Williams, *Gays in the Military: The Legal Issues*, 28 U.S.F. L. REV. 919, 927-52 (1994) (presenting potential "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" violations of the First and Fourteenth Amendments); Tobias Barrington Wolff, *Compelled Affirmations, Free Speech, and the U.S. Military's Don't Ask, Don't Tell Policy*, 63 BROOK. L. REV. 1141 (1997) (asserting the

United States military's homosexual policy. Part III discusses the specific reasons why the current policy is ambiguous and confusing for military commanders and Judge Advocate Generals (JAGs).⁵¹ Part IV compares justifications for the current policy to the rationalizations used to exclude African Americans from the military. Part V evaluates the United States' policy relative to foreign militaries' policies, illustrating how the United States is the only Western power maintaining a ban on homosexuals in its military.⁵² In conclusion, three proposals for changing the current stance on homosexuals in the United States military are presented.

policy places a burden on the First Amendment right of free speech); Kenneth S. McLaughlin, Jr., Note, *Challenging the Constitutionality of President Clinton's Compromise: A Practical Alternative to the Military's "Don't Ask, Don't Tell" Policy*, 28 J. MARSHALL L. REV. 179 (1994-1995) (asserting a violation of the Constitution's equal protection clause because the policy is not rationally related to any legitimate military interest).

51. JAGs are the military equivalent of civilian lawyers. They are officers in the Army, Navy, Air Force, Marine Corps and Coast Guard who are assigned to perform legal duties for the military. See 10 U.S.C. § 801 (1994) (defining "Judge Advocate General" and "judge advocate"). The usage of the term "judge advocate" derived from the British Articles of War of 1765 where an officer was assigned at a court-martial to inform the panel what the law was, yet still allowed to advocate on behalf of one of the parties in the proceeding, thus acting as both a judge and an advocate. See Air Force Judge Advocate General, *Fact Sheet #1: The Judge Advocate General's Department*, http://afls14.jag.af.mil/dscgi/ds.py/Get/File-7562/r_01.htm (last updated Jan. 27, 2000) (on file with author); Air Force Judge Advocate General, *Fact Sheet #5: The Air Force Judge Advocate*, http://afls14.jag.af.mil/dscgi/ds.py/Get/File-7567/r_05.htm (last updated Jan. 27, 2000) (on file with author).

52. See FRANK D. POND, GEORGETOWN UNIV. LAW CTR., A COMPARATIVE SURVEY AND ANALYSIS OF MILITARY POLICIES WITH REGARD TO SERVICE BY GAY PERSONS 12-25 (1993) (listing countries which officially banned homosexuals from the military in 1993 as: Libya, South Africa, New Zealand, Hong Kong, Argentina, Brazil, Chile, Peru, Cyprus, Greece, Ireland, Italy, Serbia and the United Kingdom). There are also countries whose militaries do not have an outright ban against homosexuals, but whose society has outlawed homosexual conduct. See *id.* Additionally, in 1993, the National Defense Research Institute selected seven countries to investigate based on differences and similarities to the United States. See NAT'L DEF. RESEARCH INST., RAND, *supra* note 30, at 66. France had no official policy, but unofficially restricted homosexual service. See *id.* Germany admitted homosexuals, but put limitations on their service. See *id.* The Netherlands and Norway admitted homosexuals into the military. See *id.* Israel, Canada and the United Kingdom were comparable to the United States military forces. See *id.* Israel, however, was preparing to make a policy change and Canada had recently lifted its homosexual ban. See *id.* The United Kingdom's policy was most similar to that of the United States, prohibiting homosexuals from openly serving. See *id.* In January 2000, however, the United Kingdom changed its policy and now allows homosexuals to serve openly in the Armed Forces. See AARON BELKIN & R.L. EVANS, UNIV. OF CAL. AT SANTA BARBARA, THE EFFECTS OF INCLUDING GAY AND LESBIAN SOLDIERS IN THE BRITISH ARMED FORCES: APPRAISING THE EVIDENCE 24-25 (2000), available at <http://www.gaymilitary.ucsb.edu/Britain1.doc> (Nov. 2000) [hereinafter BELKIN & EVANS, UNIV. OF CAL. AT SANTA BARBARA, UNITED KINGDOM REPORT]; MARK NEWTON, MINISTRY OF DEF., A REVIEW ON THE ARMED

II. HISTORY OF THE UNITED STATES MILITARY'S HOMOSEXUAL POLICY

As early as 1916, the United States military addressed sodomy as a reason for discharge.⁵³ Initially, the military prohibited assault with an intent to commit sodomy; then, in 1920, it banned sodomy as an act by itself.⁵⁴ In 1921, Army Regulation 40-105 further included discharge criteria based on male service members' feminine characteristics.⁵⁵

In World War II, military members could be separated for "inaptness [sic] or undesirable habits or traits of character."⁵⁶ In 1944, the Army issued Circular Number 3, which differentiated between discharging homosexuals "because they were not deemed 'reclaimable'" and retaining homosexuals who did not have any aggravating offenses.⁵⁷ A year later, in 1945, the Army placed greater emphasis on "reclaiming" homosexual servicemembers.⁵⁸ "Reclaimable" soldiers were those considered not to have "perverse tendencies" based on psychiatric and medical examinations.⁵⁹ In other words, if doctors decided a homosexual could be taught not to act like a homosexual, or even denounce their homosexual orientation, they were deemed fit for military service. If the Army considered a homosexual soldier "rehabilitated," it permitted him to rejoin military service.⁶⁰

FORCES POLICY ON HOMOSEXUALITY 2 (2000), available at http://www.gaymilitary.ucsb.edu/british_main3.html (Oct. 31, 2000); Andrea Szalanski, *U.S. Isolated in Military Stance on Gays*, FREE INQUIRY, July 1, 2000, at 24, available at 2000 WL 25237620.

53. See NAT'L DEF. RESEARCH INST., RAND, *supra* note 30, at 3.

54. See *id.* at 3-4.

55. See *id.* at 4 (explaining the Army's screening of "men who appeared overly feminine, with sloping shoulders, broad hips, and an absence of secondary sex characteristics, including facial and body hair").

56. 139 CONG. REC. 1371 (1993); see also *Senate Hearings*, *supra* note 31, at 14 (statement of Dr. David F. Burrelli, Analyst in Nat'l Def., Foreign Affairs and Nat'l Def. Div., Cong. Research Serv., Library of Cong.) (reporting the Army discharged soldiers based on their habits and traits which demonstrated physical or character disabilities).

57. 139 CONG. REC. 1371 (1993).

58. See *id.*

59. See HALLEY, *supra* note 33, at 45.

60. See 139 CONG. REC. 1371 (1993). The explanation behind these policies could be rooted in the differentiations of homosexual activity during World War I. In 1919, the Navy conducted a sting operation in Newport, Rhode Island, to flush out suspected homosexual military members. See George Chauncey, Jr., *Christian Brotherhood or Sexual Perversion? Homosexual Identities and the Construction of Sexual Boundaries in the World War One Era*, 19 J. SOC. HIST. 189, 189 (1986). The Navy considered the men with feminine behavior traits, rather than all homosexuals, as perverts. See *id.* at 194. During the ensuing investigations, the determining factor whether a man was considered "straight" or "queer" relied on the gender role he performed. See *id.* at 190. If a man walked with his hands on his hips in an effeminate manner, fellow soldiers assumed he was a "queer" or "fairy." See *id.* at 191-92. The men who accepted sexual favors from the "queers," but

Beginning in 1947, in addition to adopting a policy of administrative discharge and court-martial for homosexual acts, the military implemented a policy of discharging members for "homosexual tendencies" regardless of whether or not they committed any homosexual acts.⁶¹ In 1950, the Uniform Code of Military Justice (UCMJ)⁶² included consensual sodomy as a criminal offense.⁶³ In the same year, the Army also initiated a mandatory separation policy for homosexual servicemembers.⁶⁴ The Army relaxed the policy five years later in 1955;⁶⁵ when superiors considered a soldier reclaimable, there was no automatic discharge if the soldier had inadvertently participated in homosexual

only assumed the "masculine" role during homosexual encounters and publicly portrayed the expected masculine characteristics were labeled as "straight" soldiers. *See id.* at 196. The volunteers who acted as decoys to ferret out homosexual soldiers adopted these "straight" roles, and the Navy did not pursue punishment proceedings against them. *See id.* at 196-97. Thus, the line was drawn between "queers" and "normal people" who submitted to acts of perversion, but were not labeled as perverts. *See id.* at 203-04.

61. *See* 139 CONG. REC. 1371 (1993).

62. *See* 10 U.S.C. §§ 801-946 (1994) (listing the rules, jurisdiction, courts-martial composition, procedures, sentences, reviews and crimes for military criminal proceedings).

63. *See* 139 CONG. REC. 1371 (1993). The UCMJ was first enacted in 1950 and promulgated by the President of the United States in 1951 by the Manual for Courts-Martial. *See* Keith E. Nelson, Am. Bar Ass'n Standing Comm. on Armed Forces Law, *Report to the House of Delegates*, at <http://www.jaa.org/Ucmj-01u.htm> (last modified Aug. 1999) (on file with author). The current Uniform Code of Military Justice Article 125 (Sodomy) reads:

(a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.

(b) Any person found guilty of sodomy shall be punished as a court-martial may direct.

10 U.S.C. § 925 (1994). This sodomy article of the UCMJ has been interpreted to prohibit oral sex, anal sex and sex with an animal, regardless of the participants' sexual orientations. *See* NAT'L DEF. RESEARCH INST., RAND, *supra* note 30, at 10.

64. *See* 139 CONG. REC. 1371 (1993). The mandatory separation policy basically mirrored a DoD memorandum issued on October 11, 1949, requiring "[h]omosexual personnel, irrespective of sex, should not be permitted to serve in any branch of the Armed Services in any capacity, and prompt separation of known homosexuals from the Armed Forces be made mandatory." NAT'L DEF. RESEARCH INST., RAND, *supra* note 30, at 6.

65. *See Senate Hearings*, *supra* note 31, at 14 (statement of Dr. David F. Burrelli, Analyst in Nat'l Def., Foreign Affairs and Nat'l Def. Div., Cong. Research Serv., Library of Congress); 139 CONG. REC. 1371 (1993).

acts.⁶⁶ In 1958, however, the Army reverted to a mandatory separation policy.⁶⁷

The individual policies of the armed forces unified into a Department of Defense policy in 1959.⁶⁸ This first version of Department of Defense Directive (DoDD) 1332.14 designated homosexual acts as a reason to find "unfitness" for service.⁶⁹ Under a 1965 revision of this directive, members accused of homosexual acts were provided the opportunity to retain counsel and present their cases before the discharge board, thus softening the mandatory separation provision.⁷⁰ The Department of Defense again revised DoDD 1332.14 in 1970 to provide for separation of servicemembers based on homosexual acts and tendencies.⁷¹ A major problem leading to increased litigation during this time period was that the policy did not include a standard definition for "homosexual tendencies."⁷²

In an attempt to decrease the confusion inherent in interpreting the 1970 policy, the Department of Defense made two changes on January 16, 1981.⁷³ These modifications eliminated separations based on homosexual tendencies (thus leaving only homosexual acts as a basis for discharge) and reinstated a mandatory separation policy.⁷⁴ The changes were insti-

66. See *Senate Hearings*, *supra* note 31, at 14 (statement of Dr. David F. Burrelli, Analyst in Nat'l Def., Foreign Affairs and Nat'l Def. Div., Cong. Research Serv., Library of Cong.); see also 139 CONG. REC. 1371 (1993). In the 1993 policy, inadvertent homosexual acts are considered the "queen for a day" exception. See HALLEY, *supra* note 33, at 39-48. These acts are considered "inadvertent" when they are a "departure from the member's usual and customary behavior. . .[or] unlikely to recur." 10 U.S.C. § 654(b)(1)(A)-(B) (1994).

67. See 139 CONG. REC. 1371 (1993). The Army Regulations originated with Army Regulation (AR) 635-89 on September 8, 1958, then incorporated two changes including those published on April 8, 1959 and January 22, 1960. See HEADQUARTERS, DEP'T OF THE ARMY, ARMY REGULATION NO. 635-89, PERSONNEL SEPARATIONS: HOMOSEXUALITY 1 (1966). This rewrite also underwent at least three alterations. See HEADQUARTERS, DEP'T OF THE ARMY, ARMY REGULATION NO. 635-89 CHANGE NO. 1, PERSONNEL SEPARATIONS: HOMOSEXUALITY (1968); HEADQUARTERS, DEP'T OF THE ARMY, ARMY REGULATION NO. 635-89 CHANGE NO. 2, PERSONNEL SEPARATIONS: HOMOSEXUALITY (1969); HEADQUARTERS, DEP'T OF THE ARMY, ARMY REGULATION NO. 635-89 CHANGE NO. 3, PERSONNEL SEPARATIONS: HOMOSEXUALITY (1969).

68. See NAT'L DEF. RESEARCH INST., RAND, *supra* note 30, at 6-7.

69. See *id.* at 7.

70. See *id.*

71. See 139 CONG. REC. 1371 (1993).

72. See *id.* (indicating the DoD policy issued in 1970 did not define the term "homosexual tendencies").

73. See *id.* (setting forth the changes made by a memorandum from the Deputy Secretary of Defense).

74. See *id.*; NAT'L DEF. RESEARCH INST., RAND, *supra* note 30, at 7-8. The applicable text of DoDD 1332.14 follows:

gated at least in part by the case of *Matlovich v. Secretary*,⁷⁵ where for the

Homosexuality

1. Basis

a. Homosexuality is incompatible with military service. The presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission. The presence of such members adversely affects the ability of the Military Services to maintain discipline, good order, and morale; to foster mutual trust and confidence among servicemembers, to ensure the integrity of the system of rank and command; to facilitate assignment and worldwide deployment of servicemembers who frequently must live and work under close conditions affording minimal privacy; to recruit and retain members of the Military Services; to maintain the public acceptability of military service; and to prevent breaches of security.

b. As used in this section:

(1) Homosexual means a person, regardless of sex, who engages in, desires to engage in, or intends to engage in homosexual acts;

(2) Bisexual means a person who engages in, desires to engage in, or intends to engage in homosexual and heterosexual acts; and

(3) A homosexual act means bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires.

c. The basis for separation may include preservice, prior service, or current service conduct or statements. A member shall be separated under this section if one or more of the following approved findings is made:

(1) The member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are approved further findings that:

(a) Such conduct is a departure from the member's usual and customary behavior;

(b) Such conduct under all the circumstances is unlikely to recur;

(c) Such conduct was not accomplished by use of force, coercion, or intimidation by the member during a period of military service;

(d) Under the particular circumstances of the case, the member's continued presence in the Service is consistent with the interest of the Service in proper discipline, good order, and morale; and

(e) The member does not desire to engage in or intend to engage in homosexual acts.

(2) The member has stated that he or she is a homosexual or bisexual unless there is a further finding that the member is not a homosexual or bisexual.

(3) The member has married or attempted to marry a person known to be of the same biological sex (as evidenced by the external anatomy of the persons involved) unless there are further findings that the member is not a homosexual or bisexual and that the purpose of the marriage or attempt was the avoidance or termination of military service.

Enlisted Administrative Separations, 32 C.F.R. § 41 app. A at 135-36 (1993).

75. See generally *Matlovich v. Secretary*, 591 F.2d 852 (D.C. Cir. 1978). This case examined the homosexual discharge regulation that allowed for retention of a known homosexual in unusual and exceptional circumstances. See *id.* at 855; Brancato, *supra* note 32. Technical Sergeant Matlovich had twelve years of superb military service including a volunteer assignment to Viet Nam, being wounded during that assignment, revolunteering

first time the reviewing court determined the military must specifically state why it chose not to retain the servicemember in this instance as it had done in other cases.⁷⁶ The court held that the exceptions to the homosexual policy were just as binding on the Air Force as the general directive providing for discharge of homosexuals, and the discharge board must provide more than a mere recital of the same language used in the broad regulation criteria.⁷⁷ As a result of this holding, the Department of Defense had to rewrite its discharge and exception criteria to more specifically state the criteria and standards that are followed.⁷⁸ The revised criteria provided the basis for the homosexual policy in the military during the 1980s and early 1990s, where any servicemember who engaged in, desired to engage in or intended to engage in homosexual acts could be separated.⁷⁹

In January 1993, the policy gained unparalleled attention when President Clinton acted on his campaign promise to remove the military's ban on homosexuals.⁸⁰ On January 29, 1993, the Joint Chiefs of Staff agreed not to ask new recruits if they were homosexual, thus establishing the "Don't Ask" portion of the current policy.⁸¹ In addition, the Senate and House of Representatives Armed Services Committees held hearings to investigate how changes to the homosexual policy would affect the Armed Forces.⁸² The Secretary of Defense studied these hearings, along with reports from a military working group,⁸³ the RAND Corporation⁸⁴ and conferences with the Joint Chiefs of Staff and the Secretaries of each

following his injury and receiving decorations of the Bronze Star, Purple Heart, two Air Force Commendation Medals and a Meritorious Service Medal. See *Matlovich*, 591 F.2d at 855 n.4; Brancato, *supra* note 32.

76. See *Matlovich*, 591 F.2d at 857; Brancato, *supra* note 32.

77. See *Matlovich*, 591 F.2d at 857-58, 860.

78. See *id.* at 856-57. The addition of specific exception criteria resulted in the retention of more homosexual military members in the next two years than in all the years since 1948 combined. See Brancato, *supra* note 32.

79. See H.R. REP. NO. 103-200, at 287 (1993), reprinted in 1993 U.S.C.C.A.N. 2013, 2074. This language is also used in the current policy defining a homosexual. See 10 U.S.C. § 654(f)(1) (1994).

80. See Memorandum on Ending Discrimination in the Armed Forces, January 29, 1993, 1 PUB. PAPERS 23 (1993).

81. See The President's News Conference, January 29, 1993, 1 PUB. PAPERS 20 (1993).

82. See generally *Senate Hearings*, *supra* note 31 (compiling all of the testimony before the Senate Armed Services Committee); *House of Representatives Hearings*, *supra* note 49 (recording all of the testimony before the House of Representatives Armed Services Committee).

83. See WORKING GROUP, OFFICE OF THE SEC'Y OF DEF., SUMMARY REPORT OF THE MILITARY WORKING GROUP 3 (1993). One General or Flag Officer from each service is selected to serve on the military working group (MWG). This means the MWG is composed of five high-ranking officers from the Army, Navy, Air Force, Marine Corps and Coast Guard. See *id.*

of the military services.⁸⁵ After six months of research, on July 19, 1993, the Secretary of Defense presented President Clinton with a proposed policy.⁸⁶ Four months later, Congress passed the military's current "Don't Ask, Don't Tell" homosexual law.⁸⁷ By Congress' action, the former military homosexual *policy* became *law*.⁸⁸ The military formally implemented the new law on December 21, 1993, through policy guidelines outlined in DoDD 1332.14.⁸⁹ The "Don't Ask, Don't Tell" law was a compromise between Congress and President Clinton to the President's

84. See RAND, *About RAND*, at <http://www.rand.org/about/> (last visited May 13, 2001) (on file with author). RAND describes itself as "a nonprofit institution that helps improve policy and decisionmaking through research and analysis." *Id.* The Office of the Secretary of Defense paid for the report under the National Defense Research Institute of RAND. See generally Nat'l Def. Research Inst., RAND, *supra* note 30 (explaining the federal funding of the study in a note on the inside of the front cover).

85. See Memorandum from Les Aspin, Secretary of Defense, to Secretary of the Army, Secretary of the Navy, Secretary of the Air Force and Chairman, Joint Chiefs of Staff, Policy on Homosexual Conduct in the Armed Forces (July 19, 1993), available at <http://www.chinfo.navy.mil/navpalib/people/homosexu/aspi0719.txt> (on file with author).

86. See Aspin, *supra* note 85; see also Remarks Announcing the New Policy on Homosexuals in the Military, July 19, 1993, *supra* note 47, at 1110. The military's current homosexual law is founded on this memorandum from Secretary of Defense Aspin, because Congress basically enacted 10 U.S.C. § 654 with minimal change from the proposed policy. It is important to note that although 10 U.S.C. § 654 is commonly referred to as the military's "Don't Ask, Don't Tell" homosexual *policy*, it is in fact the *law*. The policy enacting this law is created by the executive branch and is found in Department of Defense Directives (DoDDs), particularly DoDD 1332.14.

87. See 10 U.S.C. § 654 (1994) (referring to the history of the policy as P.L. 103-160, Div. A, Title V, Subtitle G, § 571(a)(1), 107 Stat. 1670, passed by Congress on November 30, 1993).

88. Although the entire treatment of homosexual orientation by the military is commonly termed as the military's homosexual *policy*, this author feels it is important to note this reference to policy includes both codified *law* from Congress and *policy* guidelines from the Department of Defense. See generally 10 U.S.C. § 654 (containing the military's homosexual law); ASSISTANT SEC'Y OF DEF. (PERS. & READINESS), DEP'T OF DEF., DEP'T OF DEF. DIRECTIVE NO. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS (1993) [hereinafter DEP'T OF DEF. DIRECTIVE NO. 1332.14] (revealing some of the military's homosexual policy). Additional confusion is created by the title of the *law* itself as the "Policy Concerning Homosexuality in the Armed Forces." 10 U.S.C. § 654 (emphasis added).

89. See DEP'T OF DEF. DIRECTIVE NO. 1332.14, *supra* note 88 (setting the separation criteria for military enlisted personnel). Similar procedures for separation of military officers because of misconduct are contained in DoDD 1332.30 and DoDI 1332.40. See DEP'TY SEC'Y OF DEF., DEP'T OF DEF., DEP'T OF DEF. DIRECTIVE NO. 1332.30, SEPARATION OF REGULAR AND RESERVE COMMISSIONED OFFICERS (1997); UNDER SEC'Y OF DEF. (PERS. & READINESS), DEP'T OF DEF., DEP'T OF DEF. INSTRUCTION NO. 1332.40, SEPARATION PROCEDURES FOR REGULAR AND RESERVE COMMISSIONED OFFICERS § E2.3 (1997).

campaign promise of allowing homosexuals open access to serve in the military.⁹⁰

The military's basic policy has always essentially been (and still is) that "homosexuality is incompatible with military service."⁹¹ The "Don't Ask, Don't Tell" law includes provisions that a military member cannot (1) engage in homosexual acts, (2) state homosexual or bisexual preferences or (3) attempt to marry or marry an individual of the same sex.⁹² A violation of any of these provisions results in discharge from the armed forces.⁹³ The intended purpose of the "Don't Ask, Don't Tell" law is "sexual orientation alone will not bar individuals from military service unless it involves homosexual conduct."⁹⁴

The easing of restrictions on homosexuals in the military led to increased harassment of soldiers perceived as homosexual;⁹⁵ as a result, on March 24, 1997, the Under Secretary of Defense for Personnel and Readiness reiterated the military's basic anti-harassment policy, and also clarified it as applicable to alleged homosexuals.⁹⁶ This attempt to eliminate

90. See, e.g., *Senate Hearings*, *supra* note 31, at 731 (statement of Sen. Lieberman); Remarks Announcing the New Policy on Homosexuals in the Military, July 19, 1993, *supra* note 47, at 1111; Alfredo S. Lanier, *'Don't Ask, Don't Tell'? Don't Bother*, CH. TRIB., July 30, 2000, at C1 (showing the compromise was the result of President Clinton's first major political battle); see also David M. Rayside, *The Perils of Congressional Politics*, in GAY RIGHTS, MILITARY WRONGS 147, 147-72 (Craig A. Rimmerman ed., 1996) (indicating the compromise was formed from Congressional opposition, Clinton's lack of military service, existing state laws criminalizing same-sex activity, senior military leader opposition and public opinion).

91. Enlisted Administrative Separations, 32 C.F.R. § 41 app. A at 135 (1993) (codifying DoDD 1332.14 and describing the basis of having homosexuality as a reason for separation from military service); see also WORKING GROUP, OFFICE OF THE SEC'y OF DEF., *supra* note 83, at 7 (insisting "all homosexuality is incompatible with military service" whether their sexual orientation is known or unknown).

92. See 10 U.S.C. § 654(b).

93. See *id.* "Discharge" is defined as "complete severance from all military status gained by the enlistment or induction concerned." Enlisted Administrative Separations, 32 C.F.R. § 41 app. A at 130 (1993).

94. *House of Representatives Hearings*, *supra* note 49, at 9 (statement of Hon. Les Aspin, Sec'y of Def.).

95. See James Allon Garland, *The Low Road to Violence: Governmental Discrimination as a Catalyst for Pandemic Hate Crime*, 10 L. & SEXUALITY 1, 60 (2001); Robert Pear, *President Admits 'Don't Ask' Policy Has Been Failure*, N.Y. TIMES, Dec. 12, 1999, at § 1, p. 1, col. 6.

96. See Memorandum from Edwin Dorn, Under Secretary of Defense (Personnel and Readiness), to Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff and Inspector General of the Department of Defense, Guidelines for Investigating Threats Against Service Members Based on Alleged Homosexuality (Mar. 24, 1997), available at http://www.defenselink.mil/news/Aug1999/b08131999_bt381-99.html (Aug. 13, 1999) (on file with author). These harassment guidelines were issued in the wake of heterosexual harassment incidents at Aberdeen Proving Ground, Maryland. See Togo D. West Jr., Sec'y

threats against homosexuals was the first step in constructing the "Don't Pursue, Don't Harass" portion of the current policy. In April 1997, the Secretary of Defense initiated a review of the military's application and enforcement of the homosexual policy;⁹⁷ after spending a year in review, the military recognized the need for improvements. On April 7, 1998, the Department of Defense recommended five changes to ensure the implementation of the policy and prevent abusive investigative practices.⁹⁸

The first change recognized a challenging symmetry must be maintained between privacy rights and the military's prohibition against homosexual conduct.⁹⁹ The change further intended to guarantee investigations were initiated only after a commander received credible information of homosexual conduct.¹⁰⁰ The report recommended commanders should consult legal counsel (JAGs) in higher headquarters before beginning any investigation of alleged homosexuality to preclude widespread "witch hunts."¹⁰¹ Second, the Department of Defense recognized a problem in the improper use of pretrial agreements by means of reduced sentences in exchange for information on the homosexual conduct of others.¹⁰² The third recommendation required approval by the Secretary of the applicable Military Department¹⁰³ before commencing a

of the Army & Gen. Dennis J. Reimer, U.S. Army Chief of Staff, *There's a Problem, and We Mean To Fix It* (Feb. 4, 1997) (transcript available at <http://www.defenselink.mil/speeches/1997/t19970204-west.html>). The Department of Defense was stating its zero tolerance policy on *all* harassment. *See id.*

97. *See* OFFICE OF THE UNDER SEC'Y OF DEF. (PERS. & READINESS), DEP'T OF DEF., REVIEW OF THE EFFECTIVENESS OF THE APPLICATION AND ENFORCEMENT OF THE DEPARTMENT'S POLICY ON HOMOSEXUAL CONDUCT IN THE MILITARY § Introduction (1998), available at <http://www.defenselink.mil/pubs/rpt040798.html> (Apr. 1998).

98. *See* Press Release, Office of Assistant Secretary of Defense (Public Affairs), DefenseLINK News Release No. 158-98, Department of Defense Releases Report of Review of Implementation of Homosexual Conduct Policy (Apr. 7, 1998), at http://defense-link.mil/news/Apr1998/b04071998_bt158-98.html (on file with author); *see also* Borlik, U.S. Army, *supra* note 38.

99. *See* OFFICE OF THE UNDER SEC'Y OF DEF. (PERS. & READINESS), DEP'T OF DEF., *supra* note 97.

100. *See id.* at § II.

101. *See id.* at § Conclusion and Recommendations.

102. *See id.* at § Discussion IV(B).

103. The Secretaries of the Military Departments are the Secretary of the Air Force, Secretary of the Navy and Secretary of the Army. *See* 10 U.S.C. § 101(a)(7)-(8) (1994); U.S. Department of Defense, *Military Departments*, at http://www.defenselink.mil/pubs/almanac/mil_depts.html (last updated July 20, 1998) (on file with author). The United States Marine Corps is part of the United States Navy, and is under the control of the Secretary of the Navy. *See* 10 U.S.C. § 101(a)(9)(B); U.S. Department of Defense, *DoD At a Glance*, at <http://www.defenselink.mil/pubs/almanac/> (last visited May 27, 2001) (on file with author). The United States Coast Guard is part of the Department of Transportation, not the Department of Defense, but at times of war, the Coast Guard can be assigned as another

substantial investigation involving a servicemember's homosexual statement.¹⁰⁴ The fourth recommended change suggested reissuing the anti-harassment policy with stronger, clearer language in an attempt to have servicemembers understand that the Department of Defense views threats against homosexuals as unacceptable.¹⁰⁵ Finally, the report acknowledged some commanders and judge advocates had not received training on proper enforcement and understanding of the policy; therefore, the issue of training should be a specific item for investigation.¹⁰⁶

Despite all of these investigations and recommendations, Private Winchell's murder in July 1999 destroyed the optimism of having a successful implementation of the "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" policy.¹⁰⁷ As a result of this tragedy, the Department of Defense reissued its anti-harassment guidelines on August 12, 1999.¹⁰⁸ This reissuance of the existing directives emphasized training programs for the anti-harassment aspect of homosexual investigations.¹⁰⁹ Overall, however, the guidelines merely reiterated policy that already existed regarding the method of dealing with threats or harassment of alleged homosexuality,¹¹⁰ re-asserting that harassment based on a servicemember's alleged homosexuality is not condoned.¹¹¹ However, the recycled policy failed to mention the penalties for servicemembers who violate the "no harass-

arm of the United States Navy. See 10 U.S.C. § 101(a)(9)(B); U.S. Navy, *Navy Organization: An Overview*, at <http://www.chinfo.navy.mil/navpalib/organization/org-over.html> (last visited May 27, 2001).

104. See OFFICE OF THE UNDER SEC'Y OF DEF. (PERS. & READINESS), DEP'T OF DEF., *supra* note 97, at § Conclusion and Recommendations.

105. See *id.*

106. See *id.* at § Discussion IV(F).

107. See Hackett, *supra* note 1, at 108; Soldier Dies from Injuries Press Release, *supra* note 1 (citing the date of Winchell's brutal attack and death).

108. See de Leon, *supra* note 32 (evidencing the verbatim wording and intent as the same author's March 24, 1997 memorandum).

109. See Bradley Graham, *Reinforcing 'Don't Ask,' New Pentagon Directives Aimed at Fighting Harassment of Gays*, WASH. POST, Aug. 14, 1999, at A02, available at 1999 WL 23298024; Paul Richter, *Armed Forces Find 'Disturbing' Level of Gay Harassment; Military: In Survey of 72,000 Troops, 37% Say They've Witnessed or Been Targets of Anti-Homosexual Abuse. Pentagon Orders New Effort To Enforce 'Don't Ask' Policy*, L.A. TIMES, Mar. 25, 2000, at A1; Jim Garamone, Am. Forces Press Service, *DoD Clarifies "Don't Ask, Don't Tell" Policy*, Aug. 13, 1999, at http://www.defenselink.mil/news/Aug1999/n08131999_9908133.html (on file with author); Linda D. Kozaryn & Jim Garamone, Am. Forces Press Service, *Cohen Adds 'Don't Harass' to Homosexual Policy, Says It Can Work*, Dec. 29, 1999 (emphasizing the addition of "Don't Harass" to the homosexual policy), at http://www.defenselink.mil/news/Dec1999/n12291999_9912291.html (on file with author).

110. See de Leon, *supra* note 32.

111. See *id.* The investigation of harassment sometimes becomes the basis for an investigation of homosexual conduct, because commanders can only commence an investiga-

ment” directives.¹¹² In addition, this repetition of the anti-harassment guidelines evidences the ineffectiveness of the original policy.¹¹³ The need for additional action is a *de facto* admission by the Secretary of Defense that the original policy was inadequate.

On December 13, 1999, as a result of Private Winchell’s death, the Secretary of Defense ordered the Department of Defense’s Inspector General to evaluate the military environment regarding the “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” policy.¹¹⁴ The military’s reaction to PFC Winchell’s death continued in January 2000, as evidenced in the release of individual service departments’ harassment policies based on alleged homosexuality.¹¹⁵ Furthermore, on January 10, 2000, the Secretary of the Army ordered the Department of the Army Inspector General to investigate the climate surrounding PFC Winchell’s murder and the implementation of the homosexual policy at Fort Campbell.¹¹⁶

In an attempt to prevent acts of violence similar to those against PFC Winchell, Secretary of Defense William S. Cohen reviewed and approved each military department’s plans for training, with the review focusing on

tion of homosexual conduct after receiving credible information; in certain cases, credible information is revealed during investigation of alleged harassment. *See id.*

112. *See* Kenneth H. Bacon, Assistant Sec’y of Def. (Pub. Affairs), DoD News Briefing with Frank Rush, Assistant Sec’y of Def., Force Mgmt. Policy, & P.J. Crowley, Principal Deputy Assistant Sec’y of Def., Pub. Affairs, Participating (Feb. 1, 2000) (transcript available at http://www.defenselink.mil/news/Feb2000/502012000_t0201asd.html).

113. *See* Editorial, *No Defense for ‘Don’t Ask’ Policy*, CHI. TRIB., Sept. 2, 2000, at N26; Ricks, *supra* note 13 (detailing the Pentagon has tried many times to successfully implement the “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” policy over a time period twice as long as it fought World War II); *see also* Lanier, *supra* note 90 (responding to the anti-harassment training as an inadequate response to a policy not based on facts).

114. *See* Memorandum from Donald Mancuso, Deputy Inspector General, to Secretary of Defense & Deputy Secretary of Defense, Report on the Military Environment with Respect to the Homosexual Conduct Policy (Report No. D-2000-101) (Mar. 16, 2000) (on file with author) (affirming the tasking order to survey active duty servicemembers).

115. *See* Memorandum from Commandant of the Marine Corps to Marine Corps Administration, Homosexual Conduct Policy (Jan. 7, 2000) (on file with author); Memorandum from Caldera, Secretary of the Army, & Shinseki, Chief of Staff of the Army, to All Army Active Duty Personnel, Dignity and Respect for All (Jan. 10, 2000) (on file with author); Memorandum from Vice Admiral D. T. Oliver, Chief of Naval Operations, to Navy Administration, Continuing Guidance Concerning Proper Application of DoD Homosexual Conduct Policy (Oct. 28, 1999) (on file with author); Memorandum from General Michael E. Ryan, Chief of Staff of the Air Force, & F. Whitten Peters, Secretary of the Air Force, to All Air Force Personnel, Air Force Policy on Harassment (Jan. 10, 2000) (on file with author).

116. *See* FORT CAMPBELL TASK FORCE, DEP’T OF THE ARMY INSPECTOR GEN., *supra* note 2, at ES-1.

the "Don't Harass" aspect of the policy.¹¹⁷ On March 16, 2000, the Inspector General published the Evaluation Report.¹¹⁸

A. March 2000 Department of Defense Evaluation Report

As evidenced through the Evaluation Report, the Department of Defense was not implementing the policy as it was intended.¹¹⁹ Despite all the aforementioned training, guidance and memoranda, 80% of the servicemembers surveyed "had heard offensive speech, derogatory names, jokes, or remarks about homosexuals in the last twelve months,"¹²⁰ and 85% of the respondents considered these offensive comments somewhat tolerable.¹²¹ The report further indicated only 33% of the offensive comments were considered harassment of homosexuals.¹²² Although 78% of the respondents believed they could freely report harassment regarding alleged homosexuality to superiors, only 70% of the junior enlisted ranks, in comparison to 94% of the senior officers, felt comfortable with reporting harassment.¹²³ Furthermore, 97% of those surveyed thought they had at least some understanding of the homosexual policy.¹²⁴ Of the

117. See Press Release, Office of Assistant Secretary of Defense (Public Affairs), News Release No. 042-00, Secretary Cohen Approves Services Homosexual Conduct Training Plans (Feb. 1, 2000), at http://defenselink.mil/news/Feb2000/b02012000_bt042-00.html (on file with author).

118. See OFFICE OF THE INSPECTOR GEN., DEP'T OF DEF., REPORT NO. D-2000-101, EVALUATION REPORT ON THE MILITARY ENVIRONMENT WITH RESPECT TO THE HOMOSEXUAL CONDUCT POLICY i (2000), available at <http://www.dodig.osd.mil/audit/reports/fy00/00-101.pdf> (Mar. 16, 2000).

119. See Kenneth H. Bacon, Assistant Sec'y of Def. (Pub. Affairs), DoD News Briefing (Mar. 24, 2000) (transcript available at http://www.defenselink.mil/news/Mar2000/t03242000_t0324asd.html). The Evaluation Report surveyed 71,570 servicemembers randomly selected from 38 different Army, Navy, Air Force and Marine Corps installations. See OFFICE OF THE INSPECTOR GEN., DEP'T OF DEF., *supra* note 118, at 23-24.

120. OFFICE OF THE INSPECTOR GEN., DEP'T OF DEF., *supra* note 118, at 1.

121. See *id.* at 7-8 (illustrating the level of tolerance with only 15% saying offensive remarks about homosexuals were not tolerated).

122. See *id.* at 10. The obvious conclusion explained by this report was that the difference in percentages could be because not all offensive comments were considered harassment. A correlative explanation not contained in the Evaluation Report could be that servicemembers are not aware that offensive comments, even if not directed at a specific individual, can be classified as harassment. See *id.* Soldiers admitted, "[T]he joking and bantering that had occurred prior to July 1999 [Winchell's murder] on a regular basis could be viewed as harassment. Following training . . . , soldiers are now more apt to reconsider uttering phrases that would likely be considered harassment." FORN CAMPBELL TASK FORCE, DEP'T OF THE ARMY INSPECTOR GEN., *supra* note 2, at ES-5.

123. See OFFICE OF THE INSPECTOR GEN., DEP'T OF DEF., *supra* note 118, at 15 (explaining the source of the disparity between young enlisted recruits and senior officers that could possibly be attributed to a fear of retaliation).

124. See *id.* at 4.

54.5% who regarded themselves as understanding the policy to a large or very large extent, only 26.5% of these self-proclaimed experts answered all three specific questions concerning the policy correctly.¹²⁵ Thus, the ambiguity in the policy exists even for those who believe they understand it.

The Department of Defense recognized a solution was needed due to the dichotomy between what the military members thought they understood about the policy and the actual knowledge levels displayed by their responses.¹²⁶ The Evaluation Report indicated a great need for servicemembers to receive training on the homosexual policy: of the soldiers surveyed, 57% responded they had no training on the policy and 46% thought the anti-harassment aspect of the policy was at least slightly

125. *See id.* at 16 (presenting a value of only about one quarter of the "knowledgeable" servicemembers really being familiar with the homosexual policy). The three specific questions about the policy were:

- (1) Who can initiate an investigation, based on credible information, concerning a military person's alleged homosexual conduct?
 - (a) Installation Equal Employment Opportunity Officer
 - (b) Fellow unit member
 - (c) The military person's commander
 - (d) The military person's senior non-commissioned officer
 - (e) All of the Above
 - (f) None of the above
- (2) If a military person reports being a homosexual to his or her commander, then . . . ?
 - (a) That military person may be discharged from the military
 - (b) The ranking non-commissioned officer must initiate an investigation into that military person's sexual orientation
 - (c) That military person must move into off-base housing
 - (d) The commander is required to notify all unit personnel
 - (e) All of the above
 - (f) None of the above.
- (3) If a military person reports being threatened because he or she is perceived to be a homosexual, then . . . ?
 - (a) The commander needs no other information to initiate an investigation of the threatened military person's sexual orientation
 - (b) The report should result in a prompt investigation of the threat
 - (c) The threatened military person could be discharged from the military based solely upon the military person's report of the threat
 - (d) All of the above
 - (e) None of the above

Id. at 30. Correct answers are: 1. c, 2. a, and 3. b. *See id.* at 2; de Leon, *supra* note 32; *see also* E-mail from Sara K. Achinger, Captain, 311 HSW/JA, to Debra A. Luker, Law Student, St. Mary's University School of Law (May 18, 2001, 12:28:00 CST) (on file with author) (maintaining that the answer to the first question may be changed by guidance issued subsequent to the 1993 administration of this survey).

126. *See* OFFICE OF THE INSPECTOR GEN., DEP'T OF DEF., *supra* note 118, at 17.

ineffective in reducing harassment.¹²⁷ The training plans approved in February 2000 (just a month earlier), however, were assumed to address this problem.¹²⁸ Consequently, the military made no further recommendations.¹²⁹

B. July 2000 Department of the Army Investigation Report

The Department of the Army Inspector General completed another report in July 2000 assessing the relationship between the "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" policy and PFC Winchell's death.¹³⁰ This report, initiated as a result of Winchell's murder, found the homosexual policy was not being implemented properly due to perceptions about the risks involved once soldiers admitted they were homosexuals.¹³¹ Moreover, the main reasons for deterioration of teamwork and unit cohesion were attributed to personnel shortages and frequent deployments, not to the presence of suspected homosexuals.¹³² On a more positive note, at least two soldiers discharged under the policy wrote letters of appreciation to their commanders for the compassion and sensitivity displayed during their separation proceedings.¹³³

C. July 2000 Thirteen-Point Anti-Harassment Policy

Also in July 2000, one year after Winchell's death, the military instituted a thirteen-point policy designed to prevent the same type of harassment based on sexual orientation that led to Winchell's death.¹³⁴ This policy, however, does not fix the broken system since "harassment" still

127. See *id.* at ii.

128. See *id.* at 17.

129. See *id.* As an aftermath of the Evaluation Report, on April 20, 2000, the DoD called for public views on the "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" policy. See Linda D. Kozaryn, Am. Forces Press Service, *DoD Seeks Public Views on Homosexual Harassment*, Apr. 20, 2000, at http://www.defenselink.mil/news/Apr2000/n04202000_20004202.html (on file with author).

130. See generally FORT CAMPBELL TASK FORCE, DEP'T OF THE ARMY INSPECTOR GEN., *supra* note 2, at 2-2 (presenting findings from an investigation of the climate regarding homosexuals at the Army base where Winchell was murdered).

131. See *id.* at 2-40.

132. See *id.* at 2-8 to 2-9.

133. See *id.* at 2-44.

134. See Memorandum from Bernard Rostker, Under Secretary of Defense, Personnel and Readiness, to Secretary of the Army, Secretary of the Navy, Secretary of the Air Force, Chief of Staff of the Army, Chief of Naval Operations, Chief of Staff of the Air Force and Commandant of the Marine Corps, Approval and Implementation of the Action Plan Submitted in Response to the DoD Inspector General's Report on the Military Environment with Respect to the Homosexual Conduct Policy (July 21, 2000) (on file with author); see also Ricks, *supra* note 13.

means different things to different people.¹³⁵ The real problem is that the "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" policy is not as effective as it was intended to be.¹³⁶ The thirteen-point action plan merely spelled out anti-harassment policies that were already in place and called for the individual services to review their homosexual and anti-harassment training policies once again.¹³⁷

III. HOW THE POLICY IS AMBIGUOUS

With all of these refinements to the military's homosexual policy and military reports admitting confusion about the correct application of the policy, it is no wonder commanders and Judge Advocates do not understand "Don't Ask, Don't Tell, Don't Pursue, Don't Harass." As recently as July 2000, commanders at Fort Campbell (the site of Winchell's murder) did not understand the policy.¹³⁸ Terms such as "homosexual acts" and "propensity" are vague and subject to different interpretations, adding to the ambiguity and confusion.

A. "Homosexual Acts" Defined

A major ambiguity of "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" centers on the definition of homosexual acts. Although "homosexual acts" are defined in the statute,¹³⁹ there is room for interpretation

135. See FORT CAMPBELL TASK FORCE, DEP'T OF THE ARMY INSPECTOR GEN., *supra* note 2, at 2-12 (defining harassment as "derogatory, abusive, threatening or annoying behavior directed toward an individual or group"). *But cf.* C. Dixon Osburn & Michelle M. Benecke, *Conduct Unbecoming Continues: The First Year Under "Don't Ask, Don't Tell, Don't Pursue,"* in GAY RIGHTS, MILITARY WRONGS, *supra* note 90, at 249, 257 (listing harassment as death threats, physical abuse, verbal abuse, downgraded performance evaluations, denied reenlistment and lost promotions).

136. It is interesting to note that in the United Kingdom, both pro- and anti-homosexual groups found the United States' "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" policy "a disaster." See BELKIN & EVANS, UNIV. OF CAL. AT SANTA BARBARA, UNITED KINGDOM REPORT, *supra* note 52, at 24-25.

137. See Rostker, *supra* note 134.

138. See FORT CAMPBELL TASK FORCE, DEP'T OF THE ARMY INSPECTOR GEN., *supra* note 2, at ES-6. The Army identifies the ambiguity problems as:

... the training provided on the Policy is not clearly written, not tailored to specific audiences based on rank and duty positions, fails to adequately convey the substance of the Policy, and is presented in a format which does not foster open and meaningful discussion on the issues The use of the terms 'Don't Ask' and 'Don't Tell' in the informational materials without providing definitions to explain these phrases created a large amount of anxiety and confusion.

Id. at ES-7.

139. See 10 U.S.C. § 654(f)(3) (1994) (defining homosexual acts as "(A) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and (B) any bodily contact which a reasonable

because the definition is based on a reasonable person's assessment of the individual's propensity.¹⁴⁰ Department of Defense policy holds:

Activities such as association with known homosexuals, presence at a gay bar, possessing or reading homosexual publications or marching in a gay rights rally in civilian clothes will not, in and of themselves, constitute credible information that would provide a basis for initiating an investigation or serve as the basis for an administrative discharge under this policy.¹⁴¹

Applying these guidelines to Winchell's case, his commanders correctly determined (1) his association with a drag queen, (2) frequenting of a gay bar and (3) a statement to another soldier about his "special relationship"¹⁴² would not be a sufficient basis for a homosexual conduct discharge.¹⁴³ Given that it is the commander's decision whether an act is sufficient to merit discharge,¹⁴⁴ there can be as many differences of opinion as there are commanders.¹⁴⁵ To some, a homosexual act is only sexual intercourse between two people of the same sex. To others, a homosexual act could be two people of the same sex holding hands, or even individuals who act contrary to their gender stereotype.¹⁴⁶ Congress has defined a "homosexual act" as one that satisfies sexual desires.¹⁴⁷ Therefore, application and enforcement of the policy all hinges on an individual commander's subjective belief as to what constitutes sexual desires.¹⁴⁸

person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (A)").

140. See FORT CAMPBELL TASK FORCE, DEP'T OF THE ARMY INSPECTOR GEN., *supra* note 2, at 2-36 (expressing the presumption of junior soldiers that under the policy, it is permissible to frequent gay bars, possess and read homosexual material and associate with known homosexuals).

141. Aspin, *supra* note 85, at Attachment: Policy Guidelines on Homosexual Conduct in the Armed Forces.

142. See FORT CAMPBELL TASK FORCE, DEP'T OF THE ARMY INSPECTOR GEN., *supra* note 2, at 2-47 (remarking on Winchell's comment to a fellow soldier that military servicemembers would not accept his relationship with a drag queen).

143. See *id.*

144. See DEP'T OF DEF. DIRECTIVE NO. 1332.14, *supra* note 88; FORT CAMPBELL TASK FORCE, DEP'T OF THE ARMY INSPECTOR GEN., *supra* note 2, at 2-47.

145. See Christin M. Damiano, Comment, *Lesbian Baiting in the Military: Institutionalized Sexual Harassment Under "Don't Ask, Don't Tell, Don't Pursue,"* 7 AM. U. J. GENDER SOC. POL'Y & L. 499, 507 (1999) (agreeing commanders will differ in their approaches toward investigating alleged homosexuals).

146. See *id.* at 499.

147. See 10 U.S.C. § 654(f)(3) (1994).

148. In the military, it is the normal procedure for disciplinary actions to depend upon an individual commander's discretion. See generally Richard B. Cole, *Prosecutorial Discretion in the Military Justice System: Is It Time for a Change?*, 19 AM. J. CRIM. L. 395 (1992).

This broad definition of homosexual acts enables many investigations to be pursued from allegations of actions not enacted for sexual desires.¹⁴⁹ In other words, an investigation may start from an observation of two female servicemembers hugging each other, which was not meant as a sexual act by either one of them, but for some reason the action is reported to the commander.¹⁵⁰ According to some commentators, these alleged "homosexual acts" are often reported by a male servicemember who feels his female colleague must be a lesbian because she is not interested in him.¹⁵¹ Historically, this trend shows the discharge rate of lesbians two to three times higher than the ratio of women to the total military force.¹⁵² Using statistics from fiscal year 1998,¹⁵³ women accounted for 27.7% of the total discharges for homosexual conduct, while they constituted only 14.1% of the total force.¹⁵⁴ An argument could be made that these unbalanced figures probably exist as a result of lopsided reports and

(describing the range of the military commander's discretion under the Rules for Courts-Martial and the Uniform Code of Military Justice).

149. See Damiano, *supra* note 145, at 507. But see FORT CAMPBELL TASK FORCE, DEP'T OF THE ARMY INSPECTOR GEN., *supra* note 2, at 2-46 to 2-47 (complaining that military commanders feel they are not allowed to investigate credible information of homosexuality).

150. See Damiano, *supra* note 145, at 507; see also Schlueter, *supra* note 50, at 421 (listing kissing, embracing and dancing as prohibited behaviors).

151. See Damiano, *supra* note 145, at 509-10 (summarizing the interviews explored in Richard Sisk, *Military Women Report "Lesbian" Baiting by Brass: Harassment Charges Lead to Retaliatory Investigations and Discharges*, S.F. EXAMINER, Aug. 24, 1992, at A2).

152. See Sisk, *supra* note 151.

153. Since the DoD budget cycle runs based on the fiscal year, many military statistics are based on numbers starting on October 1 and ending on September 30. See generally Office of Management and Budget, *Fiscal Year 2002 Budget*, at <http://w3.access.gpo.gov/usbudget/index.html> (last visited May 18, 2001).

154. See U.S. DEP'T OF DEF., ACTIVE DUTY MILITARY STRENGTH: MALE/FEMALE FOR SEPTEMBER 1998 (1998) (noting the percent of female representation in the military as of September 1998 at 14.10%), at <http://web1.whs.osd.mil/mmids/military/ms5.pdf> (Sept. 1998) (on file with author); U.S. DEP'T OF DEF., TABLE II: BASIS FOR HOMOSEXUAL CONDUCT SEPARATIONS BY GENDER FISCAL YEAR 1998 (1999), at http://www.defenselink.mil/news/Jan1999/discharge_80-98.html (last updated Jan. 25, 1999) (on file with author). In fiscal year 1998, 279 females were discharged for making homosexual statements, while 38 were discharged for homosexual acts. See U.S. DEP'T OF DEF., TABLE II: BASIS FOR HOMOSEXUAL CONDUCT SEPARATIONS BY GENDER FISCAL YEAR 1998, *supra*. The same year, 712 males were discharged for their homosexual statements and 116 for their homosexual acts. See *id.* Of the 1,145 total servicemembers discharged for homosexuality, 27.7% (317 total) were females. See *id.*

investigations of alleged sexual gratification.¹⁵⁵ In any event, the policy's ambiguity is not limited to the assessment of homosexual acts.¹⁵⁶

B. *Propensity*

A second cause of the policy's vagueness is the use of a rebuttable presumption of propensity, which is included in an effort to limit discharges to "true" homosexuals.¹⁵⁷ This rebuttable presumption provision is touted as the feature that causes "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" to be more favorable to homosexuals than the pre-1993 policy.¹⁵⁸ If military members engage in homosexual acts, but do not have a "propensity" to engage in such conduct, or these members state they are homosexual, they can only be discharged after an additional finding of a "propensity" to engage in homosexual acts by that individual.¹⁵⁹ Thus, although the "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" policy claims to discharge servicemembers only for homosexual conduct, the conduct is so closely tied to a propensity that it seems the policy is, in reality, separating individuals for their homosexual orientation and status, not for the actual acts they perform.¹⁶⁰ As a result, the

155. Based on this author's research, some military servicemembers argue, originating from the stereotypical view of masculine lesbians, that there is a greater relative percentage of homosexual women in the military because the military's "macho" lifestyle appeals to the lesbian libido. See Mazur, *supra* note 50, at 957-62; Julie Yuki Ralston, *Geshas, Gays and Grunts: What the Exploitation of Asian Pacific Women Reveals About Military Culture and the Legal Ban on Lesbian, Gay and Bisexual Service Members*, 16 *Law & INEQ.* 661, 708-09 (1998).

156. See HALLEY, *supra* note 33, at 2 (suggesting the current homosexual policy is more arbitrary, broad and unpredictable than the policy prior to 1993).

157. See 10 U.S.C. § 654(b)(1)(E), (b)(2) (1994) (qualifying that servicemembers will not be administratively separated if they do not have a propensity to commit homosexual acts); HALLEY, *supra* note 33, at 4 (introducing the infamous 'rebuttable presumption').

158. See *Elzie v. Aspin*, 897 F. Supp. 1, 3-4 (D.D.C. 1995). But see *id.* at 4 n.6 (specifically pointing out that this court did not determine whether the rebuttable presumption was meaningful).

159. See 10 U.S.C. § 654(b)(1)(E), (b)(2) (inserting the propensity exception to separation for homosexual conduct and homosexual statements).

160. See *Richenberg v. Perry*, 97 F.3d 256, 264 (8th Cir. 1996) (Arnold, C.J., dissenting); Remarks at a Town Meeting in Detroit, February 10, 1993, 1 *PUB. PAPERS* 78 (1993) (quoting President Clinton's position on military members stating they are homosexuals: "This is not about conduct. This is about status."); HALLEY, *supra* note 33, at 14 (noting President Clinton claims the policy discharges military members for what they do and not what they are, but the interdependence between status and conduct saturates the "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" policy).

military's homosexual policy punishes an individual for behavior stereotypically attributed to the homosexual class.¹⁶¹

Upon introduction of the "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" policy, Secretary of Defense Les Aspin remarked that the rebuttable presumption of propensity was merely a carry-over from prior Department of Defense policy.¹⁶² Therefore, the previous case law applies, including the enlightening explanations of propensity contained in *Ben-Shalom v. Marsh*.¹⁶³ In *Ben-Shalom*, the court remarked that a servicemember's admission of homosexuality implied, "at the very least, [she had] a 'desire' to commit homosexual acts."¹⁶⁴ The court held the military could refuse the unacceptable risk that Ben-Shalom may commit homosexual acts and endanger military capability.¹⁶⁵ The conclusion was that the "acknowledgement of being a lesbian without proof of actual homosexual conduct equals reliable evidence of 'propensity.'"¹⁶⁶

More recent case law enforces the high threshold in rebutting the presumption, as seen by the court's holding in *McVeigh v. Cohen*.¹⁶⁷ Senior Chief¹⁶⁸ Timothy McVeigh¹⁶⁹ maintained an anonymous internet screen name with a user profile that included information identifying him as gay.¹⁷⁰ By conducting an investigation, the Navy linked McVeigh to the incriminating screen name and commenced discharge proceedings based on homosexual conduct, as admitted by his homosexual statement.¹⁷¹

161. See HALLEY, *supra* note 33, at 80-81 (asserting that a policy based on targeting those most likely to commit an act is descriptive of the group's behavior and not an individual's).

162. See *Senate Hearings*, *supra* note 31, at 726-27 (statement of Hon. Les Aspin, Sec'y of Def.); HALLEY, *supra* note 33, at 87.

163. See generally *Ben-Shalom v. Marsh*, 881 F.2d 454, 458, 460 (7th Cir. 1989) (allowing soldiers to associate with homosexuals, but once soldiers state they are homosexuals, the government does not need to present evidence of a homosexual act nor an intent to commit homosexual acts, because of the all-encompassing propensity presumption).

164. *Id.* at 460.

165. See *id.* at 460-461.

166. *Id.* at 459; see also HALLEY, *supra* note 33, at 83 (discussing the *Ben-Shalom* opinion and subsequent effect on the propensity presumption).

167. See *McVeigh v. Cohen*, 983 F. Supp. 215 (D.D.C. 1998).

168. Senior Chief is the common phrase used to denote a Senior Chief Petty Officer. It is the third-highest enlisted rank in the United States Navy. A Senior Chief can be promoted to Master Chief Petty Officer and from there to Master Chief Petty Officer of the Navy (a rank held by only one person at a time). See COL. JEFFREY C. BENTON, USAF (RET.), *AIR FORCE OFFICER'S GUIDE* 154 (32d ed. 1999); see also U.S. Navy, *Master Chief Petty Officer of the Navy: MCPON James L. Herdt (SS/SW/AW)*, at <http://www.chinfo.navy.mil/navpalib/mcpon/mcponpg.html> (last visited May 18, 2001).

169. McVeigh is of no relation to the Timothy McVeigh convicted of the Oklahoma City bombing. See *McVeigh*, 983 F. Supp. at 216.

170. See *id.* at 217.

171. See *id.* at 217-218.

McVeigh attempted to rebut the propensity presumption by introducing evidence of his prior heterosexual relationships and a former engagement to a woman, but to no avail.¹⁷² The board rejected all of McVeigh's evidence and discharged him from the military based on homosexual conduct.¹⁷³

In contrast to McVeigh's failure at rebutting the propensity presumption, there are claims of seven servicemembers successfully rebutting the propensity presumption,¹⁷⁴ but it is disputed whether these rebuttals were actually victorious.¹⁷⁵ Therefore, because the finding of propensity is automatically assumed when a member admits, "I am a homosexual," the inclusion of the ambiguous propensity standard allows for separation without any actual proof of homosexual conduct.¹⁷⁶

Ambiguity also stems from the fact that "propensity" is not directly defined in the "Don't Ask, Don't Tell" law of the United States Code.¹⁷⁷ Instead, the propensity definition is contained in the Department of Defense's implementation guidelines, where propensity is defined as "more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts."¹⁷⁸ The definition of propensity can also be implied from the

172. *See id.* at 218.

173. *See id.*

174. *See* *Richenberg v. Perry*, 909 F. Supp. 1303, 1313 (D. Neb. 1995), *aff'd*, 97 F.3d 256 (8th Cir. 1996) (referring to seven successful rebuttals, but not citing any specific cases).

175. *See* *Holmes v. Cal. Army Nat'l Guard*, 920 F. Supp. 1510, 1528-29 (N.D. Cal. 1996), *rev'd*, 124 F.3d 1126 (9th Cir. 1997) (addressing the lack of facts, circumstances and manner in which the presumption was rebutted); *see also* HALLEY, *supra* note 33, at 99-107 (discussing seven hearing transcripts in which the Department of Justice claims the propensity presumption was successfully rebutted, but the rebuttals were illusory). *But see* *Thorne v. United States Dep't of Def.*, 945 F. Supp. 924, 928 (E.D. Va. 1996), *aff'd*, 139 F.3d 893 (4th Cir. 1998) (recognizing that the hearing transcripts from administrative discharge boards found the presumption of propensity rebutted by four servicemembers promising to be celibate, one member showing the statement was in confidence to a counselor and two members recanting their admissions of homosexuality).

176. *See* HALLEY, *supra* note 33, at 59. Upon examining the real-world effect of the "Don't Ask, Don't Tell, Don't Harass" law and policy, some people find "[i]n the world of military anti-gay policy, 'propensity' is an ambiguous term, referring just as much to homosexual status as to homosexual acts." *Id.* at 16.

177. *See* 10 U.S.C. § 654 (1994); FORT CAMPBELL TASK FORCE, DEP'T OF THE ARMY INSPECTOR GEN., *supra* note 2, at 2-32 (investigating how the current training programs do not explain the meaning of the words "propensity," "credible information" and "reasonable belief" in the "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" policy).

178. DEP'T OF DEF. DIRECTIVE NO. 1332.14, *supra* note 88, at Definitions, pt. J. *But cf.* *Ben-Shalom v. Marsh*, 881 F.2d 454, 460 (7th Cir. 1989) (relying on a statement of homosexual orientation at least showing a "desire" to engage in homosexual acts as a basis for the propensity presumption).

findings made by Congress included in the "Don't Ask, Don't Tell" legislation, where propensity can be defined as broadly as any unacceptable risk to military capability.¹⁷⁹ The competing concepts of propensity, without a clear definition being expressly afforded in the codified law, make the rebuttable propensity presumption, in reality, irrebuttable.

Rationally, it seems the mere statement, "I am a homosexual," should not be used as proof that the individual commits homosexual acts.¹⁸⁰ However, the "rebuttable" propensity presumption of the policy appears impossible to overcome.¹⁸¹ It seems the only way for servicemembers to rebut the propensity presumption is for them to show with certainty that they do not engage in homosexual acts. Do the courts want them to account for every second of every day and provide an alibi as proof that they had no chance to engage in homosexual acts? Thus far, the rebuttable presumption is illusory and an insurmountable obstacle for gay military members.¹⁸²

By creating such a substantial hurdle to rebutting the presumption of homosexual acts, another failure of the policy occurs when ser-

179. See 10 U.S.C. § 654(a)(15). The United States Code states "a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability." *Id.*; see also HALLEY, *supra* note 33, at 58.

180. Some servicemembers make homosexual statements, but then insist they will not commit homosexual acts while serving in the military. See, e.g., *Holmes v. Cal. Army Nat'l Guard*, 124 F.3d 1126, 1130 (9th Cir. 1997) (reprinting the statement of a servicemember saying that he had no intention or propensity to engage in homosexual acts).

181. See, e.g., *id.* at 1139-40 (describing the illusory nature of the ability to rebut the presumption of propensity to commit homosexual acts); *Richenberg v. Perry*, 73 F.3d 172, 173 (8th Cir. 1995) (Arnold, C.J., dissenting) (proposing the distinction between orientation and acts is more evident than the propensity presumption allows); *Holmes v. Cal. Army Nat'l Guard*, 920 F. Supp. at 1528, *rev'd*, 124 F.3d 1126 (9th Cir. 1997) (stating the presumption is, in effect, not rebuttable); *Able v. United States*, 880 F. Supp. 968, 976 (E.D.N.Y. 1995), *rev'd*, 155 F.3d 628 (2d Cir. 1998) (declaring the chance to rebut the propensity presumption is hypothetical); *Senate Hearings*, *supra* note 31, at 772 (statement of Jamie Gorelick, Gen. Counsel, Dep't of Def.) (stating that the burden of persuasion is on the servicemember to rebut by a preponderance of the evidence, which is very difficult and no servicemember has ever done it). But see *Thorne v. United States Dep't of Def.*, 945 F. Supp. 924, 928 (E.D. Va. 1996), *aff'd*, 139 F.3d 893 (4th Cir. 1998) (presenting that after a memo from the Department of Defense's General Counsel, one case prevailed in rebutting the propensity presumption); *Eltzie v. Aspin*, 897 F. Supp. 1, 4 n.6 (D.D.C. 1995) (alleging five military members have rebutted the presumption under the policy).

182. See *Senate Hearings*, *supra* note 31, at 772 (statement of Hon. Les Aspin, Sec'y of Def.) (rebutting the presumption is only possible in cases where the servicemembers say they were joking or misunderstood).

vicemembers falsely claim to be homosexual.¹⁸³ There is suspicion some military personnel use the "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" law and policy as a quick means of obtaining an honorable discharge before the end of their commitment term.¹⁸⁴ Consequently, the homosexual policy in these cases discharges heterosexuals. In theory, the policy grants commanders the discretion to determine whether a homosexual admission is credible or made only to obtain a quick separation from the military.¹⁸⁵ However, an investigation following Winchell's death found that members making homosexual statements were discharged regardless of the veracity of their admission.¹⁸⁶

One example of whether a servicemember's statement is credible is Dr. John Hensala's highly-publicized admission of homosexuality.¹⁸⁷ In this incident, the Air Force paid Dr. Hensala's tuition for medical school in exchange for his commitment to serve four years as an Air Force physician.¹⁸⁸ Dr. Hensala claimed he was not gay when he entered the Air Force program, but became conscious of his sexual orientation during medical school.¹⁸⁹ Once he completed medical school, Dr. Hensala felt compelled to announce he was homosexual in order to maintain his psychological well-being.¹⁹⁰ However, this homosexual admission forced the

183. See FORT CAMPBELL TASK FORCE, DEP'T OF THE ARMY INSPECTOR GEN., *supra* note 2, at 2-40 (finding some members were using the homosexual policy as a way to avoid their required enlistment time).

184. See *id.* at 2-40 to 2-42; Graham, *supra* note 109; *Don't Retreat*, *supra* note 29 (explaining the current discharge statistics by admitting the quickest means of leaving the armed forces with an honorable discharge is by saying you are gay, whether it is true or not).

185. See FORT CAMPBELL TASK FORCE, DEP'T OF THE ARMY INSPECTOR GEN., *supra* note 2, at 2-37.

186. See *id.* at 2-41 to 2-44. Close to 50% of the investigated homosexual admissions may have been untrue and used only as a means to obtain discharge from the Army. See *id.* at 2-43.

187. See CNN, *John Hensala on His Experience in 'Coming Out' to the Military*, Chat Transcript (July 16, 2000), <http://www.cnn.com/chat/transcripts/2000/7/16/hensala/> (on file with author); *Don't Ask, Don't Pay*, SALT LAKE TRIB., June 6, 2000, at A14 (showing the Air Force felt Hensala revealed his homosexuality purely to avoid his military commitment, while Hensala denied this viewpoint), available at 2000 WL 3766588.

188. See CNN, *supra* note 187; see also *Don't Ask, Don't Pay*, *supra* note 187.

189. See CNN, *supra* note 187.

190. See John Chipman, *Discharged Gay Officer Won't Repay Military Scholarship: Court To Decide: Air Force Says Former Captain Broke 'Don't Ask, Don't Tell' Policy*, NAT'L POST (San Francisco), Jan. 27, 2001, at A14, available at 2001 WL 11481427; CNN, *supra* note 187; see also *Don't Ask, Don't Pay*, *supra* note 187 (claiming Hensala felt "he could not tell his patients to live their lives with integrity if he couldn't do it himself").

Air Force to discharge him and recoup his medical school tuition.¹⁹¹ Dr. Hensala contested his obligation to repay the Air Force for his training, because he was willing to serve and it was the Air Force that had terminated his contract.¹⁹² Although Dr. Hensala may have needed to admit his homosexuality to preserve his "peace of mind," the suspicious facts of his case create questions regarding the truthfulness of some "gay" servicemembers' admissions.¹⁹³

Suspicious exist that heterosexual servicemembers identify themselves as gay in order to gain an honorable discharge and not fulfill their service obligations.¹⁹⁴ Top officials admit the increase in discharges could be indicative of servicemembers using the policy to avoid serving their commitment time by claiming they are gay.¹⁹⁵ Therefore, since the propensity element of the homosexual law and policy does not require

191. See Chipman, *supra* note 190; CNN, *supra* note 187; *Don't Ask, Don't Pay*, *supra* note 187 (stating the Air Force was attempting to recover over \$70,000 in tuition, books and fees).

192. See CNN, *supra* note 187; PlanetOut News Staff, *Gay Man Contests USAF Tuition*, June 1, 2000, at <http://www.planetout.com/news/article.html?2000/06/01/2> (on file with author). Hensala's case is ongoing. On January 25, 2001, Air Force lawyers argued for dismissal before a federal judge. See E-mail from Paul Lomio, Stanford Law Library, to Debra A. Luker, Law Student, St. Mary's University School of Law (Jan. 24, 2001, 08:17:00 PST) (on file with author). On May 25, 2001, a federal district court ruled Hensala must repay the full amount the government was attempting to recoup. See *Hensala v. Dep't of the Air Force*, 148 F. Supp. 2d 988, 1004 (N.D. Cal. 2001); *Gay Doctor Must Repay Tuition*, AIR FORCE TIMES, June 11, 2001, at 3. Hensala intends to appeal this decision. See *Gay Doctor Must Repay Tuition*, *supra*.

193. The recoupment costs of \$71,429.53 that the Air Force is attempting to acquire from Hensala is a high figure, but when the meager military paycheck is compared to a lucrative private practice, it is not a heavy price to pay. See Mike McKee, *The Cost of Candor*, RECORDER, JAN. 24, 2001, at <http://www.law.com> (on file with author); see also *Don't Ask, Don't Pay*, *supra* note 187.

194. A popular culture reference that demonstrates this idea of false homosexual statements is Corporal Klinger on the M*A*S*H television show. He oftentimes dressed in women's clothing to obtain a discharge from the Army and terminate his military service before his commitment time was complete. Although Corporal Klinger was trying to prove he was crazy, and not specifically a homosexual, the false premise is analogous. See *Character Profiles* (stating Klinger spent his time acting crazy to gain discharge from the Army), <http://mash4077.superb.net/profile.html> (last visited Mar. 12, 2001) (on file with author); *Corporal Klinger* (noting Klinger dressed in other than just women's clothing in an attempt to gain a discharge), <http://mash4077.superb.net/klinger.html> (last visited Mar. 12, 2001) (on file with author); *Sidney Freedman* (summarizing an episode where Klinger refused to sign a document stating he was a transvestite and a homosexual), <http://www10.geocities.com/TelevisionCity/5576/Freedman.htm> (last visited Mar. 12, 2001) (on file with author).

195. See STEPHANIE GUTMANN, *THE KINDER, GENTLER MILITARY* 85 (2000) (elaborating on quotes by Rudy de Leon, Undersecretary of Defense for Personnel and Readiness).

proof of actual homosexual acts, the ambiguity of the "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" law and policy not only allows liars to obtain an honorable discharge, but it also fails to achieve its intended goal of allowing homosexuals to serve.

C. *Maintaining Integrity While Serving in Silence*

Tied closely to the false homosexual admissions by heterosexual servicemembers is the military's emphasis on integrity.¹⁹⁶ The "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" law and policy prohibits anyone from making a homosexual statement, which is defined as saying "I am homosexual."¹⁹⁷ The prohibition on homosexual statements ultimately forces homosexual members to lie when somebody violates the "Don't Ask" section of the policy. Hence, the "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" law and policy expects homosexual servicemembers to lie or refuse to comment, and by their silence they are basically admitting to their homosexuality.¹⁹⁸ The "Don't Tell" portion of the policy thereby forces homosexual servicemembers either to compromise their integrity or to admit to being a homosexual.¹⁹⁹

The conflict between integrity and the "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" law and policy is readily apparent, because more than 80% of homosexual discharge cases involve military members admitting to their homosexuality.²⁰⁰ However, the Ninth Circuit held a mere statement of "I am gay" does not require separation; instead, there

196. See Gerry J. Gilmore, *Senior Army Leaders Unveil Core Values Posters*, July 17, 1998, <http://www.dtic.mil/armylink/news/Jul1998/a19980717newval.html> (on file with author); Staff Sgt. Kathleen T. Rhem, *United States Army, Marines Attracting 'Great Americans'*, Dec. 15, 2000, http://www.defenselink.mil/news/Dec2000/n12152000_200012153.html (on file with author); General Michael E. Ryan, Chief of Staff, United States Air Force, *Core Values*, <http://www.usafa.af.mil/core-value/index.html> (last visited Jan. 30, 2001) (on file with author); United States Navy, *Navy Core Values*, <http://social.chass.ncsu.edu/knight/corvalu.htm> (last updated Dec. 3, 1997) (on file with author).

197. See 10 U.S.C. § 654(b)(2) (1994) (qualifying homosexual statements as a member saying, "he or she is a homosexual or bisexual, or words to that effect").

198. See FORT CAMPBELL TASK FORCE, DEP'T OF THE ARMY INSPECTOR GEN., *supra* note 2, at 2-8.

199. See Remarks at a Town Meeting in Detroit, February 10, 1993, *supra* note 160, at 78 (recounting a letter from an officer who had served with distinction and felt compelled to leave the military because "she could not be honest about her sexual orientation"); FORT CAMPBELL TASK FORCE, DEP'T OF THE ARMY INSPECTOR GEN., *supra* note 2, at 2-8 (reporting results of a survey of Army soldiers who believed "homosexual soldiers were compelled by the Policy [sic] to 'live a lie' or risk separation from the service").

200. See FORT CAMPBELL TASK FORCE, DEP'T OF THE ARMY INSPECTOR GEN., *supra* note 2, at 2-41; OFFICE OF THE UNDER SEC'Y OF DEF. (PERS. & READINESS), DEP'T OF DEF., *supra* note 97, at § Summary of Findings(I) (attributing the vast majority of homosexual discharges to cases where the servicemember made a homosexual statement).

should be supporting conduct.²⁰¹ The court held it would be irrational to hold that homosexuals have a propensity to violate military regulations, while heterosexuals do not.²⁰² Directly opposite to the Ninth Circuit's view, the Seventh Circuit has held that stating, "I am gay," is an implicit desire to commit homosexual acts, and therefore, a basis for mandatory separation.²⁰³

Despite these contradictory court rulings, several homosexual military members still believe the issue of their sexual orientation relates directly to the military's core values.²⁰⁴ Homosexual servicemembers feel the current policy asks them to lie about their genuine identities in order to retain their jobs, which is in direct conflict with the military's core values of honor and integrity.²⁰⁵ Servicemembers believe homosexual soldiers are forced to "live a lie" by providing untrue responses to even "innocent" questions such as, "Whom are you dating?"²⁰⁶ If we agree with Dr. Hensala's assertion about the need to divulge one's homosexuality for one's own mental health, then we are actually hurting our military forces by requiring homosexual servicemembers to remain silent and hide their true self.

D. *Increased Discharges Under the New "Gay-Friendly" Policy*

After implementing the "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" law and policy, which was intended to enable homosexuals to serve in the military under specified conditions, the annual discharge rate for homosexual soldiers doubled between 1993 and 1998, and this increase has persisted through 2000.²⁰⁷ The increase in reported discharges

201. See *Meinhold v. United States Dep't of Def.*, 34 F.3d 1469, 1472 (9th Cir. 1994).

202. See *id.* at 1478.

203. See *Ben-Shalom v. Marsh*, 881 F.2d 454, 460 (7th Cir. 1989) (holding that the Army does not have to take the risk an admitted homosexual will not commit homosexual acts because of the potential detrimental effects on the Army's mission).

204. See *Holmes v. Cal. Army Nat'l Guard*, 124 F.3d 1126, 1131 (9th Cir. 1997) (describing how Holmes admitted he was a homosexual because "as a matter of conscience, honesty and pride, I am compelled to inform you that I am gay"); CNN, *supra* note 187.

205. See CNN, *supra* note 187; see also, e.g., Gilmore, *supra* note 196 (naming integrity as an Army core value); Rhem, United States Army, *supra* note 196 (listing honor as a Marine Corps core value); Ryan, *supra* note 196 (listing integrity as an Air Force core value); United States Navy, *supra* note 196 (listing honor as a Navy core value).

206. See FORT CAMPBELL TASK FORCE, DEP'T OF THE ARMY INSPECTOR GEN., *supra* note 2, at 2-8.

207. See OFFICE OF THE UNDER SEC'Y OF DEF. (PERS. & READINESS), DEP'T OF DEF., *supra* note 97, at Table I (showing the discharge rate for homosexual conduct in 1993 was 0.040% of the total military personnel); U.S. DEP'T OF DEF., TABLE I: DISCHARGE FOR HOMOSEXUAL CONDUCT FISCAL YEAR 1980-1998 (1999) (listing the discharges for homosexual conduct in fiscal year 1993 as 0.040% and in fiscal year 1998 as 0.082% of the total

can be attributed partly to a change in Air Force reporting methods, which now include all homosexual separations during basic training; before 1994, these separations were classified as fraudulent enlistments.²⁰⁸ However, if the Air Force had continued to discount homosexual discharges of basic trainees, there would be approximately 20% less discharge cases per year than now reported.²⁰⁹

Using these corrected numbers on the most recent discharge statistics, there are still 357 discharges for homosexual conduct in 1998 that are in excess of what the discharges would be if the same percentage of the total force were affected as in 1993.²¹⁰ These statistics send a clear message: an increase in homosexual discharges after a supposedly more lenient homosexual law and policy were adopted is indicative of the ambiguity inherent in properly applying the policy.²¹¹

military force), at http://www.defenselink.mil/news/Jan1999/discharge_80-98.html (last updated Jan. 25, 1999) (on file with author); Vince Crawley, *Gay Discharge Rate Up in '00*, AIR FORCE TIMES, June 18, 2001, at 28 (reporting a rise in the homosexual discharge numbers between fiscal year 1999 and fiscal year 2000 of 178 servicemembers); see also Editorial, *Policy of Hypocrisy*, COURIER-JOURNAL (Louisville, Ky.), Aug. 1, 2000, at 08a (asserting the annual discharge rate for homosexual soldiers who reveal their sexuality has doubled since the "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" policy was established in 1993).

208. See Kenneth H. Bacon, Assistant Sec'y of Def. (Pub. Affairs), DoD News Briefing (Feb. 27, 1996) (demonstrating the impact of "Don't Ask" on the reporting standards in the Air Force) (transcript available at http://www.defenselink.mil/news/Feb1996/t022796_t0227asd.html) [hereinafter DoD News Briefing (Feb. 27, 1996)].

209. See DoD News Briefing (Feb. 27, 1996), *supra* note 208 (correcting the 1994 figure by subtracting 102 basic training discharges and 1995 figure by subtracting 163 discharges); OFFICE OF THE UNDER SEC'Y OF DEF. (PERS. & READINESS), DEP'T OF DEF., *supra* note 97, at § Table I (combining these reductions in discharges to account for the reporting modification yields a 16.5% reduction in homosexual conduct discharges in 1994 and a 21.5% reduction in 1995).

210. See U.S. DEP'T OF DEF., *supra* note 207. By using an average of a 20% reduction in discharges due to the reporting changes, the 1998 figures would equate to 916 total discharges, which is 0.066% of the total force end strength for that fiscal year. This is still an increase from the 1993 statistic of 0.040% of end strength. If the 1993 statistic of 0.040% of end strength is applied to the fiscal year 1998 end strength total of 1,396,341 military members (calculated by dividing 1145 discharges by 0.082% of end strength), there should have been 559 discharges for homosexual conduct in 1998, rather than the 916 discharges calculated based on numbers that do not include Air Force basic trainees. See *id.*

211. See also *Tolerance of Homosexuality on the Rise in US: Poll*, AGENCE FRANCE-PRESSE, Mar. 13, 2000 (providing recent poll results where 45% of the homosexuals surveyed believed the "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" law and policy has made service more difficult for homosexual military members).

IV. HOW THE UNITED STATES MILITARY'S JUSTIFICATIONS FOR THE HOMOSEXUAL POLICY ARE SIMILAR TO PAST JUSTIFICATIONS FOR DELAYING INTEGRATION OF AFRICAN AMERICANS

A. *Historical Justifications*

In addition to the discharge statistics apparently supporting the assertion regarding ambiguities in the "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" law and policy, disturbing correlations exist between the justifications for the military's ban of homosexuals and the pre-1948 prohibitions on African Americans.²¹² There is a striking resemblance between the rationale for discriminating against African Americans in the military in 1948 and discriminating against homosexuals in the military in 1992.²¹³

In the 1940s, the concern was for the breakdown of social barriers which maintained the "natural order"²¹⁴—the assumption that certain people should attain success only once they have actually earned the education, experience and social standing necessary for the job, rather than gaining that position through a government-imposed exception.²¹⁵ Senators noted that African Americans would degrade the military based on their supposed propensity towards crime, no disposition toward cooperation, a lack of self-pride, no sense of shame, a lack of good character, no motivation for fighting and a tendency to panic.²¹⁶ The government ar-

212. Prior to 1948, African Americans were allowed to serve in the military, but only in separate segregated units. See NAT'L DEF. RESEARCH INST., RAND, *supra* note 30, at 163. In 1948, however, African Americans were integrated into the military after President Harry S. Truman signed an executive order declaring that all persons in the Armed Services can serve regardless of race, color, religion or natural origin. See Exec. Order No. 9981, 3 C.F.R. 722 (1943-1948), *reprinted as amended in* 5 U.S.C. § 171 (Supp. II 1949); NAT'L DEF. RESEARCH INST., RAND, *supra* note 30, at 163.

213. See David Ari Bianco, *Echoes of Prejudice: The Debates Over Race and Sexuality in the Armed Forces*, in GAY RIGHTS, MILITARY WRONGS, *supra* note 90, at 47, 50. The debates, which took place in the 1940s, reveal how a common belief that African Americans were more prone to be rapists and criminals mirrors the belief by some people that homosexuals have an insatiable sex drive which leads them to be rapists, a trait that makes them unfit for military service. See *id.*

214. See 88 CONG. REC. A4389 (1942).

215. See *id.* See generally NAT'L DEF. RESEARCH INST., RAND, *supra* note 30, at 171-72 (contending the different historical experiences of the African-American and Caucasian races would destroy unit cohesion and morale if the races were integrated into the same military units).

216. See 94 CONG. REC. 7489, 7491 (1948); see also HALLEY, *supra* note 33, at 64. Army General H. Norman Schwarzkopf attributed similar characteristics to homosexuals by saying,

[H]omosexuals, by definition, are individuals who have an established predilection for violating the Uniform Code of Military Justice through the commission of sodomy.

gued that such deficient characteristics would destroy unit cohesion and teamwork, which are essential elements in combat, by permitting African Americans and Caucasians to serve together and ultimately causing the American soldier's health to suffer.²¹⁷ The military's ultimate goal was the same as that expressed today: to ensure an effective policy for our national defense; however, the prevailing position has been that changes to 150-year-old military traditions would wreak chaos and confusion upon the effective defense of our country.²¹⁸

In addition, lawmakers were particularly leery about suddenly eliminating segregation rather than taking a safe, gradual approach; they thought a sudden desegregation would create immediate civil turmoil.²¹⁹ The fear was that any integration would cause social tension among the troops because of their innate prejudices.²²⁰ Proponents of segregation argued that African Americans themselves would prefer segregation in the ranks in order to do their best work.²²¹ General Dwight D. Eisenhower stated, much as military generals feel today toward homosexuals, that the unique organization of the Army places men in intimate living conditions which breed trouble when people with prejudices are assigned to the same units.²²² Thus, the desegregation of the Armed Forces was characterized as a great tragedy that would relegate our great military establishment from the world's best to second-rate mediocrity.²²³

These fears were proven to be unfounded, though, and some observers contend the integration of racial minorities improved the military's unit

Exclusion of homosexuals from military service is a means of precluding military service by a group of individuals who have a natural proclivity to commit criminal acts. *Senate Hearings*, *supra* note 31, at 599 (statement of Colonel Frederick Peck, U.S. Marine Corps) (quoting Army General H. Norman Schwarzkopf).

217. *See* 94 CONG. REC. 7498 (1948); NAT'L DEF. RESEARCH INST., RAND, *supra* note 30, at 172.

218. *See* 94 CONG. REC. 7355 (1948); NAT'L DEF. RESEARCH INST., RAND, *supra* note 30, at 172.

219. *See* 94 CONG. REC. A4647 (1948).

220. *See* 94 CONG. REC. 8684 (1948); NAT'L DEF. RESEARCH INST., RAND, *supra* note 30, at 171-72.

221. *See* 94 CONG. REC. 8684 (1948).

222. *See id.*

223. *See* 94 CONG. REC. 7489 (1948); *see also, e.g., Senate Hearings*, *supra* note 31, at 594-96 (statement of General H. Norman Schwarzkopf, U.S. Army (Retired)) (attributing the quality of the United States military to the quality of the recruited members and advanced technical equipment); Tech. Sgt. R.R. Getsy, *AF Unveils New TV Commercials*, Aug. 23, 2000 (presenting the new Air Force slogan as "America's Air Force — No One Comes Close," and interpreting this saying as meaning the United States has the best Air Force in the world), at http://www.af.mil/newspaper/v2_n33/v2_n33_s10.htm (on file with author).

cohesion.²²⁴ All of these unfounded fears bear remarkable resemblance to today's justifications for preventing homosexuals from openly serving within the Armed Forces of the United States.

B. *Current Justifications*

Similar to the arguments against racial desegregation, opponents of the "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" law and policy argue that integrating homosexuals into the Armed Forces will decrease the military's unit cohesion, morale and discipline.²²⁵ Cohesion is the bonding between soldiers and their leaders that allows a military unit to withstand the horrors of combat, support each other and fight toward their goal rather than retreat.²²⁶ The Department of Defense's rationale is that the essential element of teamwork is built on a foundation of trust, and without trust, the unit cohesion and morale would suffer.²²⁷ Similarly, military leaders recognize that cohesion and morale, or *esprit de corps*, is the real issue; members of the Armed Forces need to be able to trust their team.²²⁸ Soldiers place the most emphasis on members being able to do their jobs and being productive members of a team.²²⁹

A discriminating policy that seems to arbitrarily and ambiguously target a category of people, like homosexuals today and African Americans in the 1940s, actually diminishes morale by creating the atmosphere of a "witch hunt" to eliminate an "untrustworthy" member of the team.²³⁰ Maintaining the secret of one's homosexuality required under the "Don't

224. See NAT'L DEF. RESEARCH INST., RAND, *supra* note 30, at 176-77, 180-83 (holding that once soldiers shared common tasks, the unit cohesion improved and previous attitudes toward a minority group changed).

225. See 10 U.S.C. § 654(a)(6) (1994); cf. 94 CONG. REC. A4653 (1948) (declaring a lack of efficiency, unity and cooperation as the justifications against African Americans in the military).

226. See 139 CONG. REC. 13,517 (1993).

227. Bernard D. Rostker, Under Sec'y of Def. (Pers. & Readiness), DoD News Briefing with Gen. Eric Shinseki, Chief of Staff of the Army, & Carol DiBattiste, Under Sec'y of the Air Force, Participating (July 21, 2000) (transcript available at http://www.defenselink.mil/news/Jul2000/t07212000_t721rost.html).

228. See Letter to the Editor, Joseph Gigliotti, *Surviving's Not Everything*, WASH. POST, Sept. 4, 2000, at A24. The Army used images from the television show "Survivor" to promote recruitment despite the fact the show's winner, Richard Hatch, is a homosexual. See *id.* Mr. Hatch's destructive impact on the group's morale and cohesion supports the ban on homosexuals, and his annihilation of *esprit de corps* is the antithesis to the military's idea of how a homosexual should serve under "Don't Ask, Don't Tell, Don't Pursue, Don't Harass." See *id.*

229. See GUTMANN, *supra* note 195, at 194-95.

230. But cf. FORT CAMPBELL TASK FORCE, DEP'T OF THE ARMY INSPECTOR GEN., *supra* note 2, at 2-12 (reviewing the homosexual discharge cases at Fort Campbell, where PFC Winchell was murdered, and not finding evidence of "witch hunts").

Ask, Don't Tell, Don't Pursue, Don't Harass" law and policy is a major factor in creating the "witch hunt" atmosphere in the military.²³¹ On the same line, military members' morale, and thus unit cohesion, would be adversely affected if they believe one person is not following the same standards of good order and discipline. The presence of homosexual military members should not decrease morale, so long as they are required to follow the same rules of order and discipline, and all servicemembers are uniformly punished for violations. This comment does not advocate "special treatment" for homosexuals; instead, it proposes *equal treatment* where all members are held to the same standards of conduct.

One may ask why a homosexual does not avoid military service, since it is public knowledge they will be subjecting themselves to a culture that does not accept any homosexual conduct. The answer is that, as an American, all homosexual soldiers want to do is to serve their country and protect freedom. It is this author's belief that the homosexuals who today serve in the military are extremely patriotic servicemembers, because they brave potential harassment and discharges every day in order to defend the country whose military does not approve of their homosexual orientation.²³² As long as servicemembers keep their sexual behavior private, their sexuality should not be considered an issue. Homosexuals can defend our country just as well as heterosexuals, and already have; it is sexual promiscuity itself, whether homosexual or heterosexual in nature, that adversely affects troop morale, cohesion and effectiveness.²³³ Any types of provocative sexual overtures or insinuations, whether homosexual or heterosexual in nature, should be dealt with equally, because these actions are what damage military order and discipline.²³⁴

231. See Scott A. Olivolo, Editorial, *As You Were Saying . . . Air Force Doc Casts Doubt on 'Don't Ask, Don't Tell,'* BOSTON HERALD, July 22, 2000, at O14.

232. However, the United States military routinely discriminates regardless of the servicemember's motivation or patriotism. See Schlueter, *supra* note 50, at 399. Discriminatory standards used include age, citizenship, education, aptitude, physical fitness, dependency status, moral character and provisions related to homosexual conduct. See ASSISTANT SEC'Y OF DEF. (PERS. & READINESS), DEP'T OF DEF., DEP'T OF DEF. DIRECTIVE NO. 1304.26, QUALIFICATION STANDARDS FOR ENLISTMENT, APPOINTMENT, AND INDUCTION § E1.2.1-8 (1994).

233. See *Campaign 2000: Highlights from the Campaign Trail*, FORT WORTH STAR-TELEGRAM, Sept. 7, 2000, at NEWS11. John Hagelin from the Reform and Natural Law parties was asked, "Do you support the '[D]on't ask, [D]on't tell' policy on gays in the military?" *Id.* His full response was, "'Don't ask, [D]on't tell' is a recipe for discrimination. Gays should be allowed to defend our country, as they indeed always have, without censure of silence. Naturally, sexual promiscuity - heterosexual or homosexual - has no place in the military." *Id.*

234. See GUTMANN, *supra* note 195, at 194-95.

In addition, the fact that women are now allowed to serve side by side in combat with men overshadows the use of sexual tension between servicemembers as a justification for the "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" law and policy.²³⁵ There is just as much sexual tension between heterosexual military colleagues as between homosexual ones.²³⁶ In fact, deployed troops claim there is nothing better to do overseas than act upon the sexual tensions present.²³⁷ As a result of these sexual tensions, there was a need to evacuate female servicemembers from deployments due to pregnancies.²³⁸ Thus, the greatest disruption to good order and discipline is the blatant flaunting of sexuality, whether heterosexual or homosexual in nature.²³⁹

The military's potentially strongest justification for banning homosexuals is surprisingly absent from the codified law.²⁴⁰ If homosexuals are allowed to join the military, there could be a significant increase in health care costs.²⁴¹ The increased medical costs are predicted due to a higher rate of Human Immunodeficiency Virus (HIV) infection in the male homosexual population.²⁴²

235. See *Able v. United States*, 155 F.3d 628, 634 (2d Cir. 1998) (showing that reducing sexual tension is a justification for prohibition of homosexual conduct).

236. See GUTMANN, *supra* note 195, at 195 (exposing some of the heterosexual sexual tensions present in the military).

237. See *id.*

238. See *id.* (reporting that in Bosnia from December 20, 1995, to July 1996, approximately one woman had to be returned every three days to the United States because she was pregnant).

239. See *id.*

240. See 10 U.S.C. § 654(a) (1994) (listing the Congressional findings which contain the justifications for the policy).

241. See 139 CONG. REC. 16,591-92 (1993) (reporting that the projected medical costs over the first five years after the homosexual ban is lifted could total \$4.6 billion, without detailing the rationalizations for this number); Robert L. Maginnis, Editorial, *Should Gays Serve Openly in the Military? Military Has the Right to Ban Gays To Preserve Its Fighting Capability*, SUN-SENTINEL (Ft. Lauderdale), Feb. 14, 2000, at 23A (asserting the Army Surgeon General associates homosexuality with high rates of sexually transmitted disease), available at 2000 WL 5639790.

242. See NAT'L DEF. RESEARCH INST., RAND, *supra* note 30, at xxii; see also Kevin Tebedo, *Lifting Gay Military Ban Hits Emotional Chord*, L.A. TIMES, Nov. 19, 1992, at A5 (quoting the co-founder of Colorado for Family Values as claiming, "There is no question that the homosexual community, particularly males, are very diseased . . . If one of these men who's known to be gay gets shot or gets hurt or starts bleeding, it's going to be very difficult to find people who are going to rush over to take care of them."), available at 1992 WL 2837139. But see CENTERS FOR DISEASE CONTROL & PREVENTION, TABLE 6: HIV INFECTION CASES BY AGE GROUP, EXPOSURE CATEGORY, AND SEX, REPORTED THROUGH JUNE 2000, FROM THE 36 AREAS WITH CONFIDENTIAL HIV INFECTION REPORTING (2000) (holding 33% of the people infected with HIV were exposed to the virus only by homosexual conduct, and from July 1999 to June 2000 that figure dropped to 28%), at <http://www.cdc.gov/hiv/stats/hasr1201/table6.htm> (last updated Dec. 6, 2000) (on file with

The wartime scenario of requiring all troops to donate blood also creates concerns about the spread of AIDS and similar blood diseases among troops.²⁴³ The military already has precautions in place, however, that should render this argument moot.²⁴⁴ The Department of Defense routinely tests every entrant into the military and each deployed member for HIV.²⁴⁵ Ultimately, there is minimal risk HIV-infected personnel will pass the medical tests required during recruitment or influence military effectiveness.²⁴⁶ Even if there is an increase in health care expense, the escalation would most likely be offset by the current cost of separating homosexuals from the service, which was estimated to be \$500 million over ten years.²⁴⁷

The risk of detriment to worldwide deployment, unit cohesion, morale and discipline are the military's main reasons for banning homosexual

author); Press Release, Stephen Soba, Gay Men's Health Crisis, GMHC Releases Largest Survey Since the Start of AIDS on Gay Men's Sexual Practices in New York City: Encompassing More Than 7,000, Survey Shows the Power of Community Based Research and Explodes Myths About Safer Sex Practices, HIV Testing, and Other Critical Issues (June 27, 1999) (estimating that 50% infection rates among homosexual men is not indicative of today's statistics, which show only 13% of the male homosexual population testing positive for HIV), at <http://www.gmhc.org/aboutus/press/990627.html> (on file with author).

243. See Bianco, *supra* note 213, at 51.

244. See NAT'L DEF. RESEARCH INST., RAND, *supra* note 30, at 248-54 (exploring Department of Defense testing programs for AIDS and HIV). The military typically is able to transport adequate supplies of blood from the United States to the war site, but if collections of blood from the battlefield are required, the same exclusion criteria are used as in any other volunteer blood donation. See *id.* at 269-70. The current Department of Defense policy regarding HIV involves denying entrance into the military to anyone testing HIV positive and periodically screening active duty servicemembers for HIV. See ASSISTANT SEC'Y OF DEF. (HEALTH AFFAIRS), DEP'T OF DEF., DEP'T OF DEF. DIRECTIVE NO. 6485.1, HUMAN IMMUNODEFICIENCY VIRUS-1 (HIV-1) § 4.1-4.2 (1991). Once an active duty member tests positive for HIV, a medical evaluation is conducted in accordance with all other investigations for progressive illnesses. See *id.* at § 4.3; NAT'L DEF. RESEARCH INST., RAND, *supra* note 30, at 253-54. If the infected military members are found fit for duty, they are not retired or separated from service, but are restricted to assignments in the United States and are not eligible for deployments to potential battlefield locations. See ASSISTANT SEC'Y OF DEF. (HEALTH AFFAIRS), DEP'T OF DEF., *supra*, at § 4.3, 6.16; see also NAT'L DEF. RESEARCH INST., RAND, *supra* note 30, at 253-54.

245. See NAT'L DEF. RESEARCH INST., RAND, *supra* note 30, at xxii, 248-50 (detailing the initial and periodical HIV screenings conducted throughout a servicemember's career).

246. See *id.* at 271 (emphasizing the stringent testing and assignment standards established to prevent increases of HIV infections among military members).

247. See The President's News Conference, January 29, 1993, *supra* note 81, at 20, 22 (presenting President Clinton's statement of statistics regarding the cost of separating about 16,500 homosexuals from military service); Remarks at a Town Meeting in Detroit, February 10, 1993, *supra* note 160, at 78 (targeting the payments as occurring in the 1980s); see also Remarks Announcing the New Policy on Homosexuals in the Military, July 19, 1993, *supra* note 47, at 1109.

conduct; however, these justifications mask prejudice similar to the unfounded justifications for racial segregation in military service.²⁴⁸ The justifications thinly veil prejudice, fear, bigotry and monetary concerns.

Allowing homosexuals to serve is arguably different than allowing service by African Americans, because homosexuality is an issue that touches on deeply-held moral convictions.²⁴⁹ Yet, as society's view of moral behavior evolves, some actions that were once considered morally repugnant are now socially accepted.²⁵⁰ Based on the changing social climate, it is likely the current attitude regarding homosexuals will gravitate towards a more accepting medium.²⁵¹

This type of social change is not unprecedented; an example involves state prohibitions against interracial marriages. In the past, the general public considered interracial marriage immoral, but the United States Su-

248. *Compare* *Able v. United States*, 155 F.3d 628, 634 (2d Cir. 1998) (asserting the plaintiff's position that an illegitimate purpose cannot support unequal treatment of homosexuals versus heterosexuals which was rejected by the court because, in the military setting, the government can have an illegitimate reason for discrimination), with 87 CONG. REC. A5658 (1942) (referring to Pearl S. Buck's letter to the editor of the *Pittsburgh Courier* and reprinted in the *New York Times* stating the arguments against allowing African Americans to serve in the military were based on prejudice).

249. *Cf.*, *Senate Hearings*, *supra* note 31, at 763 (statement of Gen. Colin L. Powell, Chairman, Joint Chiefs of Staff) (asserting the issue of homosexual integration in the military cannot be compared to racial and gender integration); NAT'L DEF. RESEARCH INST., RAND, *supra* note 30, at 38 (maintaining that admitting homosexuals to serve openly in the military touches on social attitudes and moral beliefs).

250. Citizens with a sense of decency and propriety thought it was morally repugnant to allow African Americans into the military in 1948. *See* 94 CONG. REC. 7495 (1948). Correspondingly, a morally-accepted practice now considered immoral is the "Rule of Thumb" which held a man could beat his wife with a stick as long as it was not thicker than his thumb. *See* *State v. Burtzlaff*, 493 N.W.2d 1, 13 (S.D. 1992); Victoria Mikesell Mather, *The Skeleton in the Closet: The Battered Woman Syndrome, Self-Defense, and Expert Testimony*, 39 MERCER L. REV. 545, 547-48 (1988); Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 268 n.5 (1985); *see also* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 432-33 (photo. reprint 1966) (Oxford, Clarendon Press 1765).

251. *See* *House of Representatives Hearings*, *supra* note 49, at 32 (statement of Gen. Colin Powell, Chairman, Joint Chiefs of Staff) (indicating the military is a reflection of society, and its rules cannot move ahead of or fall behind society-at-large, and military policy is related to society's evolution toward greater tolerance and acceptance of minorities); NAT'L DEF. RESEARCH INST., RAND, *supra* note 30, at xxi. A recent poll shows that only 21% of the U.S. population believes homosexuals should not be allowed to serve in the military under any conditions; in comparison, 61% of the U.S. population opposed the racial integration of the military in 1948. *See* NAT'L DEF. RESEARCH INST., RAND, *supra* note 30, at xxi.

preme Court held these state prohibitions were unconstitutional because they were based on invidious racial discrimination.²⁵²

With today's society giving less credence to the justifications for "Don't Ask, Don't Tell, Don't Pursue, Don't Harass," the question "What are the effects of allowing homosexuals to serve openly in the military?" naturally arises. Possible answers to this question can be deduced from the experiences documented by other countries which have lifted their bans on homosexuals serving in their militaries.²⁵³ In the wake of these international changes, it is evident the United States is holding on to an antiquated military tradition that is no longer recognized in modern society.

V. THE UNITED STATES IS THE ONLY WESTERN POWER BANNING HOMOSEXUALS FROM MILITARY SERVICE

As of January 2000, the United States and Turkey are the only North Atlantic Treaty Organization (NATO) members²⁵⁴ banning homosexuals from openly serving in the military.²⁵⁵ This distinction is especially significant because United States military actions are becoming predominantly coalition-based,²⁵⁶ with a large amount of cooperation and interaction

252. See generally *Loving v. Virginia*, 388 U.S. 1, 11-12 (1967) (holding the state's interest in preserving "White Supremacy" is not justified under the Equal Protection Clause of the United States Constitution).

253. See Editorial, *Gays Should Serve Openly*, ST. LOUIS POST-DISPATCH, Jan. 14, 2000, at C16, available at 2000 WL 3502026.

254. The purpose of NATO is to safeguard its member countries. See NATO, *Welcome to NATO*, at <http://www.nato.int/welcome/home.htm> (last visited May 19, 2001). The member countries of NATO are: Belgium, Canada, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey, the United Kingdom and the United States. See *id.* When the member countries meet a consensus that a particular conflict needs to be resolved, NATO leads a multi-national military force composed of member countries' and other nations' forces. See *id.* NATO used one such multi-national force to restore peace and democracy to Kosovo. See *id.*

255. See *British Military To Accept Gays: Conduct Code To Erase Ban*, FLA. TIMES-UNION (Jacksonville), Jan. 13, 2000, at A13, available at 2000 WL 6813002; *Most of West Permits Gays To Serve in Military*, DES MOINES REG., Jan. 13, 2000, at 7, available at 2000 WL 4941253; T.R. Reid, *Britain Drops Military Ban on Gays To Comply with Ruling: The United States and Turkey Are Now the Only NATO Members that Bar Avowed Homosexuals*, FT. WORTH STAR-TELEGRAM, Jan. 13, 2000, at 16, available at 2000 WL 4989971; T.R. Reid, *British Military Lifts Restrictions on Gays*, SUN-SENTINEL (Ft. Lauderdale), Jan. 13, 2000, at 14A, available at 2000 WL 5633465.

256. See generally STRATEGY DIVISION, OFFICE OF THE CHAIRMAN OF THE JOINT CHIEFS OF STAFF, JOINT VISION 2020, at 16 (2000) (defining coalitions as "military actions conducted by forces of two or more nations," similar to an alliance), available at <http://www.dtic.mil/jv2020/jvpublish.htm> (June 2000).

with foreign militaries.²⁵⁷ The United States military heavily participates in these coalition forces (such as those used in United Nations peace-keeping actions).²⁵⁸ The danger exists that if the United States is left as the only military not allowing homosexuals to serve openly, a resentment or suspicion could damage the United States' cohesion, good order and discipline when working with homosexual members of foreign militaries.

The following sections examine how the changes in military homosexual policies in the United Kingdom, Canada, Australia, Israel and a few other nations affected the quality of those countries' armed forces. The sections then compare the experiences gained in those countries to the current justifications used to keep homosexuals from serving openly in the United States military.

A. United Kingdom

The United Kingdom is the latest country to lift its ban on homosexuals serving openly in the military.²⁵⁹ On September 27, 1999, the European Court of Human Rights (ECHR) issued two decisions which initiated this policy change.²⁶⁰

The United Kingdom military's policy prior to January 12, 2000, was to discharge all known homosexual soldiers,²⁶¹ an identical position to the

257. See generally *id.*, at 4, 6, 12, 15, 16, 31, 32, 36 (addressing the need for and importance of future United States military forces to be able to operate in multi-national coalitions); Andrew S. Miller, *Universal Soldiers: U.N. Standing Armies and the Legal Alternatives*, 81 GEO. L.J. 773, 784 (1993) (predicting the United States will not be able to afford to police the entire world in the future, so United Nations military forces will be needed); Richard G. Catoire, *A CINC for Sub-Sahara Africa? Rethinking the Unified Command Plan*, PARAMETERS, Jan. 1, 2000, at 102, 102-17 (concentrating on the international pressures for the United States to take the lead in addressing problems in Africa), available at <http://carlisle-www.army.mil/usawc/Parameters/00winter/catoire.htm>; Jonathan Marcus, *Kosovo and After: American Primacy in the Twenty-First Century*, WASH. Q., Jan. 1, 2000, at 74 (listing recent international coalition operations as Operation Desert Fox, the Balkans and East Timor).

258. See generally *Security Council Expands Mandate, Numbers of Sierra Leone Force, Adopting Resolution 1289 (2000) Unanimously*, M2 PRESSWIRE, Feb. 9, 2000 (recounting the United States' interest in bringing peace to Sierra Leone, and its high priority in helping to build "respect for human rights and the democratic process" through United Nations coalitions), available at 2000 WL 12933225.

259. See NEWTON, MINISTRY OF DEF., *supra* note 52 (dating Parliament's announcement of the United Kingdom's new policy as January 12, 2000); Szalanski, *supra* note 52.

260. Richard Kamm, Comment, *European Court of Human Rights Overturns British Ban on Gays in the Military*, 7 HUM. RTS. BR. 18, 19 (2000).

261. See BELKIN & EVANS, UNIV. OF CAL. AT SANTA BARBARA, UNITED KINGDOM REPORT, *supra* note 52, at 3; POND, GEORGETOWN UNIV. LAW CTR., *supra* note 52, at 74. See generally NAT'L SEC. & INT'L AFFAIRS DIV., U.S. GEN. ACCOUNTING OFFICE, GAO/NSIAD-93-215, HOMOSEXUALS IN THE MILITARY: POLICIES AND PRACTICES OF FOREIGN

current policy in the United States.²⁶² Similar to the United States' current justifications of unit cohesion, morale and discipline,²⁶³ the justifications for the United Kingdom's previous policy were to maintain unit effectiveness, morale and discipline.²⁶⁴ Additionally, the United Kingdom argued that, due to the intimate quarters required for extended periods during some military duties, allowing homosexuals to serve was impractical.²⁶⁵ No heterosexuals wanted to be ogled by homosexuals in the showers or to sleep next to them.²⁶⁶ The United Kingdom even included the risk of sexual tension as a detriment to lifting the homosexual ban because there would be a lack of trust among the troops, which in turn affects unit cohesion.²⁶⁷ All of these potential results led to an additional concern that there would be a drop in recruiting numbers since the British Armed Forces is an all-volunteer force, just like the United States military.²⁶⁸

Opponents to the United Kingdom's anti-homosexual policy pointed out that unit cohesion and discipline during NATO maneuvers were not affected by the presence of homosexuals in the militaries of Canada, Norway, Denmark, Holland, Belgium, Spain, France, Germany, Australia, New Zealand, Ireland, Israel, Sweden, Austria and Switzerland, even when the British troops served alongside them.²⁶⁹ The European Court of Human Rights gave substance to these opponents' objections when the court unanimously held the military's homosexual ban was unjustified.²⁷⁰

COUNTRIES 25-26 (1993) (explaining the treatment of homosexuality under British military and civilian law).

262. See 10 U.S.C. § 654 (1994) (codifying the law which discharges any servicemembers who state they are homosexual or engage in homosexual acts).

263. See 10 U.S.C. § 654(a)(15).

264. See BELKIN & EVANS, UNIV. OF CAL. AT SANTA BARBARA, UNITED KINGDOM REPORT, *supra* note 52, at 3; NAT'L DEF. RESEARCH INST., RAND, *supra* note 30, at 74-75 (evaluating the United Kingdom's ban as relating primarily, if not exclusively, to unit cohesion and morale).

265. See BELKIN & EVANS, UNIV. OF CAL. AT SANTA BARBARA, UNITED KINGDOM REPORT, *supra* note 52, at 16; Martin Bowley, *We Want You As a New Recruit*, LAWYER (London), Aug. 1, 1995, at <http://www.thelawyer.co.uk> (on file with author).

266. See BELKIN & EVANS, UNIV. OF CAL. AT SANTA BARBARA, UNITED KINGDOM REPORT, *supra* note 52, at 16.

267. See *id.* at 16-17.

268. See *id.* at 39, 60; Bowley, *supra* note 265; see also *Senate Hearings*, *supra* note 31, at 596 (statement of General H. Norman Schwarzkopf, U.S. Army (Retired)) (including an emphasis on the quality of the United States' all-volunteer Armed Forces); NAT'L DEF. RESEARCH INST., RAND, *supra* note 30, at 100 (stating the United Kingdom is an all-volunteer force).

269. See Bowley, *supra* note 265.

270. See BELKIN & EVANS, UNIV. OF CAL. AT SANTA BARBARA, UNITED KINGDOM REPORT, *supra* note 52, at 23. See generally Lustig-Prean & Beckett v. United Kingdom, 29 Eur. Ct. H.R. 548, 572-87 (1999); Smith & Grady v. United Kingdom, 29 Eur. Ct. H.R. 493,

After reviewing several other countries' approaches to homosexual military service, on January 12, 2000, the United Kingdom's Secretary of State for Defense formally announced the new policy that permits homosexuals to serve openly in the British Armed Forces.²⁷¹ Once the British Armed Forces implemented the new policy, they received only one resignation of a senior leader because of his strong personal feelings against having homosexuals serve in their military.²⁷² At the six-month anniversary of implementation, the three individual Services²⁷³ reported no notable difficulties concerning homophobic behavior or operational effectiveness.²⁷⁴

One aspect that has been vital to the success of the United Kingdom's policy stems from the strong direction by leaders from the top levels down.²⁷⁵ These military leaders stress "behavior rather than sexual orientation is what ultimately matters to the men and women in the Armed Services."²⁷⁶ Hence, the United Kingdom was able to change its policy because they highlighted their Code of Conduct (similar to the United States' Uniform Code of Military Justice), which "applies equally to heterosexual behavior as it does to homosexual behavior."²⁷⁷ The United

529-37 (1999) (holding the United Kingdom's policy was unjust because it violated the right to privacy under the European Convention).

271. See BELKIN & EVANS, UNIV. OF CAL. AT SANTA BARBARA, UNITED KINGDOM REPORT, *supra* note 52, at 24-25; see also Reid, *British Military Lifts Restrictions on Gays*, *supra* note 255.

272. See *Top Officer Quits Over Gays in British Army*, AGENCE FRANCE-PRESSE, Jan. 27, 2000, available at 2000 WL 2721243; William S. Cohen, Sec'y of Def., & Geoffrey Hoon, Sec'y of State for Def. (U.K.), DoD News Briefing (Jan. 27, 2000) (transcript available at http://www.defenselink.mil/news/Jan2000/t01272000_t0027uk_.html) [hereinafter DoD News Briefing (Jan. 27, 2000)].

273. The three British military branches are the Royal Navy, the Army and the Royal Air Force. See CIA, *The World Factbook 2000—United Kingdom*, at <http://www.odci.gov/cia/publications/factbook/geos/uk.html> (last visited Mar. 14, 2001) (on file with author); Ministry of Defence, United Kingdom, *Armed Forces*, at <http://www.mod.uk/index.php3?page=6> (last visited Mar. 14, 2001) (on file with author).

274. See NEWTON, MINISTRY OF DEF., *supra* note 52 (informing that in the report issued six months after the United Kingdom implemented their new policy, it was found "[i]n fact, there has been a marked lack of reaction"); Ben Summerskill, *It's Official: Gays Do NOT Harm Forces: Six Months On, Confidential MoD Report Reveals No Adverse Effects on Morale*, OBSERVER, Nov. 19, 2000, at 5 (reporting operational effectiveness, morale and recruitment suffered no adverse effects after lifting the ban on homosexual servicemembers), available at 2000 WL 26995159.

275. See MARK NEWTON, MINISTRY OF DEF., A REVIEW ON THE ARMED FORCES POLICY ON HOMOSEXUALITY 1 (2000), available at http://www.gaymilitary.ucsb.edu/british_main2.html (Oct. 31, 2000).

276. BELKIN & EVANS, UNIV. OF CAL. AT SANTA BARBARA, UNITED KINGDOM REPORT, *supra* note 52, at 41.

277. DoD News Briefing (Jan. 27, 2000), *supra* note 272.

Kingdom's Secretary of State for Defense further clarified that all military members do not have reduced contributions or responsibilities based on their sexual orientation.²⁷⁸

The situation in the United Kingdom was not very different from the one presently facing the United States.²⁷⁹ One similarity is that some college campuses banned the United Kingdom's Armed Forces from their career fairs, because the colleges protested the unenlightened policy that banned gays from the military.²⁸⁰ After the lifting of the homosexual ban, however, the military was once again allowed to participate in these recruitment opportunities.²⁸¹

278. *See id.*

279. *See id.* But see BELKIN & EVANS, UNIV. OF CAL. AT SANTA BARBARA, UNITED KINGDOM REPORT, *supra* note 52, at 5-6 (chronicling the removal of laws criminalizing private homosexual sex between two adult men).

280. *See* NEWTON, MINISTRY OF DEF., *supra* note 52 (noting the change in acceptance at the Student Union "Fresher's Fairs").

281. *See id.* Some schools in the United States also protest allowing military recruitment on campus because of the "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" law and policy. *See* Greg Jonsson, *WU Law Students Protest Return of Military Recruiters*, ST. LOUIS POST-DISPATCH, Feb. 24, 2001, at NEWS7; Rowan Scarborough, *Bans on Military Recruiters Stymie Enlistment Efforts*, WASH. TIMES (D.C.), May 29, 2000, at A3; Andrea Stone, *Bill Ties School Funds to Military Recruiting*, USA TODAY, Apr. 5, 2000, at 3A; Anthony Winer & Ann Juergens, *Army's Discrimination Prompts Campus Recruitment Ban*, STAR TRIB. (Minneapolis-St. Paul), Apr. 29, 2000, at 23A. High schools and law schools are the most prevalent at this practice. *See* Jonsson, *supra*; Scarborough, *supra*; Stone, *supra*; Winer & Juergens, *supra*. Almost one quarter of the nation's high schools place restrictions on military recruiters as a protest against military spending or the anti-homosexual policy. *See* Scarborough, *supra*; Stone, *supra*. Several law schools also denied military recruiters access to their campuses because of the military's discrimination against sexual orientation. *See* Jonsson, *supra*; Winer & Juergens, *supra*. The Association of American Law Schools requires recruiting firms to sign a form stating they do not discriminate on certain grounds, including sexual orientation. Many law schools have therefore refused to allow military recruiters on campus. *See* Brendan Watson, *Wash. U' Law School Protests DOD Recruiters*, STUDENT LIFE, Nov. 21, 2000, via University Wire; *see also* Jonsson, *supra*; Winer & Juergens, *supra*. By refusing access to military recruiters, these schools were risking the loss of federal funding. Before October 5, 1999, however, the withholding of government funds was effective only against the subsection of the university that refused military recruiters. *See* Department of Labor, Health and Human Services, and Education, and Related Agencies Appropriation Act of 1997, Pub. L. No. 104-208, Div. A, Title V, § 514(b)-(f), 110 Stat. 3009 (1996). In other words, if the law school refused access to military recruiters, the medical and undergraduate subsections of the same university still received government funding. *See* Watson, *supra*. On October 5, 1999, the act was amended to refuse government funding to the entire institution of higher education, not just the subelement of the university. *See* National Defense Authorization Act for FY2000, Pub. L. No. 106-113, § 549, 113 Stat. 512 (1999); Jonsson, *supra*; Watson, *supra*. Therefore, the law currently provides that if an institution of higher education refuses access to military recruiters, no funds from the Department of Defense, Labor, Health and Human Services, Education, Transportation and related agencies are made available to the

The strong leadership in support of the United Kingdom's new policy has eased the transition to open service by homosexuals; in fact, the Royal Navy's most senior officer admitted the acceptance of homosexuals into the ranks has caused less havoc than the admission of women.²⁸² Regretfully, however, there are still attacks in England that mirror the brutality Private Winchell suffered in the United States.²⁸³ Richard Young, the first military member to successfully challenge the British military's ban on homosexuality, was severely beaten and left for dead by homophobic attackers three months after the Royal Navy reinstated him.²⁸⁴ Therefore, it cannot be assumed that allowing homosexuals to serve openly will eliminate all violence against them. Accordingly, the military will need to continue to enforce its zero-tolerance harassment policy and to administer severe punishment for violations.²⁸⁵

B. Canada

In October 1992, over seven years before the United Kingdom lifted its ban, Canada decided to permit homosexuals to serve openly in their military forces.²⁸⁶ Initially, the Canadian military forbade homosexuals from serving based on arguments similar to those used by the United States, including the fact that sexual orientation was not an enumerated ground of prohibited discrimination in the Canadian Charter of Rights and Free-

university. This denial of funds includes grants for student aid. See 10 U.S.C. § 983(b), (d) (Supp. V 1999). For just one university, this federal money could total in the hundreds of millions of dollars annually. See Jonsson, *supra*.

282. See Michael Paterson, *News: Gays in Navy 'Cause Fewer Waves Than Wrens'*, DAILY TELEGRAPH (London), Sept. 1, 2000, at O1 (admitting that there had been some resignations, but the overall change had been less difficult than expected).

283. See *Homophobic Attackers Leave Man for Dead*, W. MORNING NEWS (Plymouth, England), Sept. 5, 2000, at AGENCY23.

284. See *id.*

285. See NAT'L DEF. RESEARCH INST., RAND, *supra* note 30, at 280; NEWTON, MINISTRY OF DEF., *supra* note 275 (relating the United Kingdom's adoption of an anti-harassment policy including sexual orientation).

286. See AARON BELKIN & JASON McNICHOL, UNIV. OF CAL. AT SANTA BARBARA, EFFECTS OF THE 1992 LIFTING OF RESTRICTIONS ON GAY AND LESBIAN SERVICE IN THE CANADIAN FORCES: APPRAISING THE EVIDENCE §§ I, V (2000), at http://www.gaymilitary.ucsb.edu/canada_pub.htm (Apr. 2000) [hereinafter BELKIN & McNICHOL, UNIV. OF CAL. AT SANTA BARBARA, CANADA REPORT]; NAT'L DEF. RESEARCH INST., RAND, *supra* note 30, at 74, 77; POND, GEORGETOWN UNIV. LAW CTR., *supra* note 52, at 80-81 (giving the exact date of the military's announcement as October 27, 1992); Sally Jacobs et al., *Canada To Let Gays Serve in Forces; Impact Eyed on US Ban*, BOSTON GLOBE, Oct. 28, 1992, at 1; Mary Williams Walsh, *Canada Far Ahead of U.S. in Recognizing Gay Rights Justice: Nearly Two-Thirds of the Provinces Prohibit Discrimination. The Military Now Accepts Homosexuals*, L.A. TIMES, Dec. 29, 1992, at A1.

doms.²⁸⁷ Comparable to the United States, Canadian polls conducted before they removed the homosexual ban indicated 45% of the servicemembers would refuse to work with gays and lesbians.²⁸⁸ In addition, the Canadian military issued a report in 1986 which resisted allowing homosexuals to serve openly in the military by citing justifications equivalent to those of the United States: military cohesion, morale, discipline, recruitment and operational effectiveness.²⁸⁹

This 1986 report responded to rulings by the Canadian federal court that interpreted the Canadian Constitution to prohibit discrimination based on sexual orientation.²⁹⁰ Then, when preparing for a case challenging the homosexual ban in 1992, the Canadian Department of National Defense determined they could not win the case and the military's ban did violate the Canadian Charter of Rights and Freedoms.²⁹¹

Following settlement of the case,²⁹² the Canadian military lifted its ban, not by implementing a separate policy regarding homosexuality, but instead by making its harassment and service restriction policies neutral as

287. See BELKIN & McNICHOL, UNIV. OF CAL. AT SANTA BARBARA, CANADA REPORT, *supra* note 286, at § IV(B); see also POND, GEORGETOWN UNIV. LAW CTR., *supra* note 52, at 76 (arguing the ban's justifications included unit morale).

288. See BELKIN & McNICHOL, UNIV. OF CAL. AT SANTA BARBARA, CANADA REPORT, *supra* note 286, at § IV(B) (stating the results of a survey of Canadian soldiers conducted in 1986); cf. *Americans Split Evenly on Gay GIs 45% Want Ban; 44% Do Not*, Survey Finds, BALTIMORE EVENING SUN, Dec. 17, 1992, at 1A (reporting the results of a poll of Americans in November 1992 as 45% for the homosexual ban in the military and 44% against the ban).

289. See BELKIN & McNICHOL, UNIV. OF CAL. AT SANTA BARBARA, CANADA REPORT, *supra* note 286, at § IV(B). An additional justification was the privacy rights of non-homosexual military members. See NAT'L DEF. RESEARCH INST., RAND, *supra* note 30, at 76; POND, GEORGETOWN UNIV. LAW CTR., *supra* note 52, at 76-77.

290. See BELKIN & McNICHOL, UNIV. OF CAL. AT SANTA BARBARA, CANADA REPORT, *supra* note 286, at § V; NAT'L DEF. RESEARCH INST., RAND, *supra* note 30, at 75-76.

291. See BELKIN & McNICHOL, UNIV. OF CAL. AT SANTA BARBARA, CANADA REPORT, *supra* note 286, at § IV(C); NAT'L DEF. RESEARCH INST., RAND, *supra* note 30, at 76-77; NAT'L SEC. & INT'L AFFAIRS DIV., U.S. GEN. ACCOUNTING OFFICE, *supra* note 261, at 29-30; POND, GEORGETOWN UNIV. LAW CTR., *supra* note 52, at 80-81; Jacobs et al., *supra* note 286. The Canadian Charter of Rights and Freedoms is generally considered similar to the United States' Bill of Rights. See BELKIN & McNICHOL, UNIV. OF CAL. AT SANTA BARBARA, CANADA REPORT, *supra* note 286, at § IV(B); NAT'L DEF. RESEARCH INST., RAND, *supra* note 30, at 75.

292. The settlement required the military to admit the ban on homosexual service was unconstitutional and pay \$100,000 to the litigant in this case. See NAT'L DEF. RESEARCH INST., RAND, *supra* note 30, at 77; POND, GEORGETOWN UNIV. LAW CTR., *supra* note 52, at 80; David Vienneau & Jack Lakey, *Ruling Seen As Precedent in Job Bias Against Guys*, TORONTO STAR, Oct. 28, 1992, at A1; see also BELKIN & McNICHOL, UNIV. OF CAL. AT SANTA BARBARA, CANADA REPORT, *supra* note 286, at § IV(C).

to sexual orientation.²⁹³ This approach is the same one proposed by this comment—homosexuals should be allowed to serve openly in the United States military under the same regulations, restrictions and protections afforded to heterosexual servicemembers. The United States must recognize, just as the Canadian military did, that it should not try to change people's attitudes toward homosexuals, and harassment of homosexual members will have a negative effect on the unit's effectiveness.²⁹⁴ The Canadian policy emphasizes "skill and ability should be the only criteria upon which people are judged."²⁹⁵

Following Canada's repeal of its homosexual ban, the United States conducted studies on the effects of this decision on the Canadian military capability.²⁹⁶ The studies found that fears of a decrease in recruitment, retention, cohesion and morale appeared to be unfounded.²⁹⁷ No increase in resignations or harassment complaints by military members appeared, and recruitment numbers experienced no adverse effects.²⁹⁸ Similarly, there were no news reports following the lifting of the ban that cited morale problems, anti-homosexual violence or harassment.²⁹⁹ Indeed, most performance and morale problems dealt with race and gen-

293. See BELKIN & McNICHOL, UNIV. OF CAL. AT SANTA BARBARA, CANADA REPORT, *supra* note 286, at § VI(A); NAT'L DEF. RESEARCH INST., RAND, *supra* note 30, at 77-78; NAT'L SEC. & INT'L AFFAIRS DIV., U.S. GEN. ACCOUNTING OFFICE, *supra* note 261, at 30 (stating the conduct standards are identical for heterosexual and homosexual servicemembers); Reid, *British Military Lifts Restrictions on Gays*, *supra* note 255 (acknowledging homosexuals in the Canadian military are not afforded any special considerations or arrangements).

294. See BELKIN & McNICHOL, UNIV. OF CAL. AT SANTA BARBARA, CANADA REPORT, *supra* note 286, at § VI(A); NAT'L DEF. RESEARCH INST., RAND, *supra* note 30, at 79-80.

295. BELKIN & McNICHOL, UNIV. OF CAL. AT SANTA BARBARA, CANADA REPORT, *supra* note 286, at § VI(A).

296. See *id.* at § VII(A)(2)-(3). See generally NAT'L DEF. RESEARCH INST., RAND, *supra* note 30, at 74-80 (examining the experience of Canada's military forces in lifting the restrictions on homosexual service along with the experiences of six other countries).

297. See BELKIN & McNICHOL, UNIV. OF CAL. AT SANTA BARBARA, CANADA REPORT, *supra* note 286, at § VII(A)(2); NAT'L DEF. RESEARCH INST., RAND, *supra* note 30, at 79; NAT'L SEC. & INT'L AFFAIRS DIV., U.S. GEN. ACCOUNTING OFFICE, *supra* note 261, at 31-32; POND, GEORGETOWN UNIV. LAW CTR., *supra* note 52, at 81-82.

298. See BELKIN & McNICHOL, UNIV. OF CAL. AT SANTA BARBARA, CANADA REPORT, *supra* note 286, at § VII(A)(4); NAT'L DEF. RESEARCH INST., RAND, *supra* note 30, at 79; NAT'L SEC. & INT'L AFFAIRS DIV., U.S. GEN. ACCOUNTING OFFICE, *supra* note 261, at 31-32; Ana Puga, *Ex-General Sees Gays Hurting Military: Quality Would Fall, He Says*, BOSTON GLOBE, Apr. 30, 1993, at 3; see also POND, GEORGETOWN UNIV. LAW CTR., *supra* note 52, at 81-82.

299. See BELKIN & McNICHOL, UNIV. OF CAL. AT SANTA BARBARA, CANADA REPORT, *supra* note 286, at § VII(A)(5); NAT'L DEF. RESEARCH INST., RAND, *supra* note 30, at 79; POND, GEORGETOWN UNIV. LAW CTR., *supra* note 52, at 81-82.

der,³⁰⁰ and a report noted no change in military performance following the repeal of the homosexual ban.³⁰¹ The primary consequence appeared to be that gay and lesbian soldiers could work without fear of being summarily discharged if someone reported their sexual orientation.³⁰²

Evidenced by a lack of consequences, a smooth transition occurred when homosexuals were allowed to serve openly.³⁰³ The main reasons for Canada's smooth transition include the military leadership support of the new policy and minimal media scrutiny of the policy change.³⁰⁴ The absence of outright disapproval for allowing homosexuals to serve does not mean that some servicemembers do not agree with the new policy, however.³⁰⁵ These members simply realize the job comes first, and their job involves supporting military policy.³⁰⁶ Even a Canadian Forces member who opposed lifting the ban and believed homosexuals would destroy the critical element of teamwork acquiesced, "There's a lot in the military that's out of your hands. The policy is very clear."³⁰⁷

Therefore, with a clear, unambiguous policy and proper senior leader support, the Canadian military trains its members to comply with the new

300. See BELKIN & McNICHOL, UNIV. OF CAL. AT SANTA BARBARA, CANADA REPORT, *supra* note 286, at § VII(B)(4).

301. See *id.* at § I; NAT'L DEF. RESEARCH INST., RAND, *supra* note 30, at 79.

302. See BELKIN & McNICHOL, UNIV. OF CAL. AT SANTA BARBARA, CANADA REPORT, *supra* note 286, at § VII(A)(2); NAT'L SEC. & INT'L AFFAIRS DIV., U.S. GEN. ACCOUNTING OFFICE, *supra* note 261, at 32.

303. See BELKIN & McNICHOL, UNIV. OF CAL. AT SANTA BARBARA, CANADA REPORT, *supra* note 286, at § VII(A)(1); NAT'L DEF. RESEARCH INST., RAND, *supra* note 30, at 79; NAT'L SEC. & INT'L AFFAIRS DIV., U.S. GEN. ACCOUNTING OFFICE, *supra* note 261, at 27; see also POND, GEORGETOWN UNIV. LAW CTR., *supra* note 52, at 81-82.

304. See BELKIN & McNICHOL, UNIV. OF CAL. AT SANTA BARBARA, CANADA REPORT, *supra* note 286, at § VII(A)(1); NAT'L DEF. RESEARCH INST., RAND, *supra* note 30, at 79; NAT'L SEC. & INT'L AFFAIRS DIV., U.S. GEN. ACCOUNTING OFFICE, *supra* note 261, at 27, 32.

305. See BELKIN & McNICHOL, UNIV. OF CAL. AT SANTA BARBARA, CANADA REPORT, *supra* note 286, at § VII(A)(5).

306. See *id.* An anonymous Black Watch (RHR) officer in Montreal was quoted as stating: "There are a lot of guys in uniform who hate homosexuals, and don't want them around in the service. A lot of men are disgusted with the court ruling, but they have to live with it. They don't want to speak up. They're just keeping their heads down." *Id.* It was also recognized that senior officers who opposed the policy change may personally oppose the new military position, but will nevertheless support the policy. See *Armed and Gay: Homosexuals in the Military Face an Uneasy Welcome*, MACLEAN'S (Toronto), May 24, 1993, at 14-15.

307. BELKIN & McNICHOL, UNIV. OF CAL. AT SANTA BARBARA, CANADA REPORT, *supra* note 286, at § VII(A)(5) (quoting Master Corporal Mike Simic of the Canadian Forces).

directives even if there are conflicts with their personal feelings.³⁰⁸ On the contrary, an ambiguous law and policy such as "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" permits conflicting personal feelings to affect the application of the guidelines.

With their straightforward guidelines, Canada experienced no adverse consequences on military effectiveness.³⁰⁹ Military leaders and servicemembers were more worried about budget cuts, downsizing (now referred to as "rightsizing"³¹⁰) and changes in operational approaches, than whether homosexuals were an accepted minority within their ranks.³¹¹ Consequently, low pay was a more important issue to the Canadian soldiers serving in Bosnia and Kosovo than their fellow combatants' sexual orientations.³¹² These monetary concerns parallel those of the United States' military members.³¹³

While most Canadian soldiers were not concerned with the change in policy, it is interesting to note that the highest opposition to the new policy was from older servicemembers.³¹⁴ Internationally, younger troops appear to be more tolerant of differences in sexual orientation.³¹⁵ As

308. See *id.* at §§ VII(B)(3), VIII (noting how the soldiers are expected to uphold the law and set their personal feelings aside).

309. See *id.* at § VII(B)(1); NAT'L DEF. RESEARCH INST., RAND, *supra* note 30, at 79; POND, GEORGETOWN UNIV. LAW CTR., *supra* note 52, at 81-82.

310. See Press Release, Office of Assistant Secretary of Defense (Public Affairs), DefenseLINK News Release No. 071-96, FY 1996 Reserve Component Unit Inactivations (Feb. 13, 1996) (using the phrase "rightsize" while describing reductions in manpower), at http://www.defenselink.mil/news/Feb1996/b021396_bt071-96.html (on file with author).

311. See BELKIN & McNICHOL, UNIV. OF CAL. AT SANTA BARBARA, CANADA REPORT, *supra* note 286, at § VII(B)(3); see also Rowan Scarborough, *Readiness of Armed Forces Is Not Improving: Clinton Action on Pentagon Cuts Seen As Cause of Problem*, WASH. TIMES (D.C.), Aug. 28, 2000, at A1 (discussing the record increase in worldwide deployments during 1999).

312. See BELKIN & McNICHOL, UNIV. OF CAL. AT SANTA BARBARA, CANADA REPORT, *supra* note 286, at § VII(B)(4).

313. See FORT CAMPBELL TASK FORCE, DEP'T OF THE ARMY INSPECTOR GEN., *supra* note 2, at 2-8 (attributing soldiers' frustrations to personnel shortages and increased operational tempos).

314. See BELKIN & McNICHOL, UNIV. OF CAL. AT SANTA BARBARA, CANADA REPORT, *supra* note 286, at § VII(B)(3).

315. See *id.*; see also *Armed and Gay: Homosexuals in the Military Face an Uneasy Welcome*, *supra* note 306; Simon Brauholtz et al., *The Truth: We're a Tolerant Nation; The Sunday Herald Poll Finds People in Favour of Homosexuality Being Tolerated But Not Promoted*, SUNDAY HERALD (Scotland), Jan. 23, 2000, at 3 (reporting older Scottish people are less likely to view homosexuality as an acceptable lifestyle than younger Scots); Michael Fallow, *Been Outraged Lately? Michael Fallow Looks at Broadcasting Standards Research*, SOUTHLAND TIMES (New Zealand), May 13, 2000, at FEATURES29 (analyzing surveys concerning offensive television content and finding that older age groups are more easily offended); Lynne Jones, *Gays: The Great Debate - Section 28: What the Row is About*, BIRMINGHAM EVENING MAIL, Feb. 9, 2000, at 10 (proposing the major opposition

time progresses, these younger members will move up the ranks and enter leadership roles, so the military's acceptance of homosexuals likely will become a non-issue within the armed forces.³¹⁶ In fact, from 1992 to 1998, surveys demonstrated a significant drop (as much as 31%) in United States Army soldiers' opposition to serving with gays and lesbians.³¹⁷ Due to the similarities between Canadian and American culture, this trend of acceptance and lack of negative effects from allowing homosexuals to serve openly will likely continue in the United States.³¹⁸

to allowing schools to teach acceptance of homosexual relationships is from the older generation and "younger people are much more tolerant"); Richard Morin, *Unconventional Wisdom: New Facts and Hot Stats from the Social Sciences*, WASH. POST, Dec. 3, 2000, at B05 (presenting evidence that 85% of young people and 68% of older people accept instruction by a gay professor, but the generation gap has been closing since 1973); *Survey Backs Gay Rights*, SENTINEL (Stoke), Aug. 28, 2000, at 9 (showing younger people were more tolerant than the older generation in a survey regarding homosexual rights and education); Sharon Warden, *Attitudes on Homosexuality*, WASH. POST, Apr. 25, 1993, at A18 (revealing younger people, men and African Americans are more tolerant of homosexuals than older Americans, women and Caucasians). *But see* Richter, *supra* note 109 (stating Frank Rush, Deputy Undersecretary of Defense for Force Management Policy, believes an Inspector General survey suggests younger, less educated male servicemembers are more likely to make anti-homosexual statements).

316. *See, e.g., Armed and Gay: Homosexuals in the Military Face an Uneasy Welcome*, *supra* note 306 (predicting anti-gay sentiment will diminish as younger soldiers move up the ranks; inferred from a statement made by a member of the Canadian National Defence Consultative Committee on Social Change); Nora Underwood et al., *Homosexual Rights: A Moderate Majority Accepts Gays*, MACLEAN'S (Toronto), Jan. 2, 1989, at Cover22 (analyzing questionnaire responses and finding older respondents were more concerned about homosexuality, whereas the younger respondents viewed homosexuality as merely an alternative lifestyle); *see also* NAT'L SEC. & INT'L AFFAIRS DIV., U.S. GEN. ACCOUNTING OFFICE, *supra* note 261, at 10 (reporting foreign militaries have experienced no adverse effects by allowing homosexuals to serve openly since sexual orientation is not an issue, mainly because most servicemembers do not disclose their homosexuality).

317. *See* Julia Adams, *Second Circuit Upholds Gays in Military Policy*, Sept. 23, 1998 (stating that Professor Charles Moskos, Northwestern University, and Laura Miller, UCLA, conducted a survey finding 67% of Army men and 31% of Army women were strongly opposed to gays and lesbians in the military in 1992, compared with 36% of men and 16% of women who were strongly opposed in 1998), at http://www.sldn.org/scripts/sldn.ix?page=pr_09_23_98 (on file with author).

318. *See* BELKIN & McNICHOL, UNIV. OF CAL. AT SANTA BARBARA, CANADA REPORT, *supra* note 286, at § VII(A)(5) (paraphrasing a quote by Captain Folkins, Royal Montreal Regiment, about the sensitivity among personnel following the removal of the ban: the United States has blown the issue of the military's homosexual policy out of proportion). *See generally* Rowan Scarborough, *Retired Officers Slam Gore's Demand on Gays for Joint Chiefs*, WASH. TIMES (D.C.), Jan. 7, 2000, at A1 (mentioning that the former Marine Corps Commandant believes none of the military's four-star officers in January 2000 supported allowing homosexuals to serve openly).

C. Australia

Like Canada, Australia also lifted its ban on homosexuals serving in the military in 1992.³¹⁹ The Australian Prime Minister abolished the ban because of three reasons: (1) changing social and international trends; (2) the policy was found to be contrary to international human rights agreements concerning discrimination; and (3) "closet" homosexuality in the military conflicted with efforts to combat Acquired Immune Deficiency Syndrome (AIDS).³²⁰

Before the lifting of its ban, the Australian Defence Forces³²¹ argued that allowing homosexuals to serve openly in the military would cause detrimental effects on unit cohesion, combat effectiveness, recruitment and the spreading of disease,³²² which are likewise the same justifications used for the "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" law and policy.³²³ However, after the policy changed, the Australian Defence Forces reported no detrimental effects, and the issue faded from public view.³²⁴

319. See AARON BELKIN & JASON McNICHOL, UNIV. OF CAL. AT SANTA BARBARA, THE EFFECTS OF INCLUDING GAY AND LESBIAN SOLDIERS IN THE AUSTRALIAN DEFENCE FORCES: APPRAISING THE EVIDENCE § I (2000), at http://www.gaymilitary.ucsb.edu/australia_pub.htm (Sept. 19, 2000) [hereinafter BELKIN & McNICHOL, UNIV. OF CAL. AT SANTA BARBARA, AUSTRALIA REPORT]; NAT'L SEC. & INT'L AFFAIRS DIV., U.S. GEN. ACCOUNTING OFFICE, *supra* note 261, at 19; POND, GEORGETOWN UNIV. LAW CTR., *supra* note 52, at 91; *Australia Permits Gays To Serve in the Military*, S.F. EXAMINER, Nov. 24, 1992, at A10; Tina Diaz, *Forces Told: It's OK To Be Gay*, SYDNEY MORNING HERALD, Nov. 24, 1992, at 1.

320. See BELKIN & McNICHOL, UNIV. OF CAL. AT SANTA BARBARA, AUSTRALIA REPORT, *supra* note 319, at § III(C); *Australia Permits Gays To Serve in the Military*, *supra* note 319; Amanda Meade, *Forces Role for Gays, Say Bilney*, SYDNEY MORNING HERALD, July 7, 1992, at 3. See generally POND, GEORGETOWN UNIV. LAW CTR., *supra* note 52, at 86-91 (enumerating the various unfounded justifications for the ban and society's acceptance of homosexuality as major contributors to the eradication of the ban).

321. "Defence" is the correct Australian spelling. See generally Australian Defence Department, *Defence* (spelling "Defence" on the Australian Defence Force's home page), at <http://www.defence.gov.au/index.html> (last visited Feb. 24, 2001); Australian Defence Department, *Defence Force Journal* (publishing the journal of the Australian profession of arms as the Australian Defence Force Journal), <http://www.defence.gov.au/pacc/dfj/index.html> (last visited Feb. 24, 2001).

322. See BELKIN & McNICHOL, UNIV. OF CAL. AT SANTA BARBARA, AUSTRALIA REPORT, *supra* note 319, at § II; POND, GEORGETOWN UNIV. LAW CTR., *supra* note 52, at 87-89; Diaz, *supra* note 319; Meade, *supra* note 320.

323. See generally 10 U.S.C. § 654(a) (1994) (listing the Congressional findings justifying the homosexual law in the military, including morale, discipline, unit cohesion and privacy restrictions).

324. See BELKIN & McNICHOL, UNIV. OF CAL. AT SANTA BARBARA, AUSTRALIA REPORT, *supra* note 319, at § II (2000); POND, GEORGETOWN UNIV. LAW CTR., *supra* note 52, at 91; *Controversy in Australia Short-Lived End of Military Gay Ban Changes Little*, BALTI-

The Australian military overcame the justifications for the policy since the troops really did not care if somebody was gay, the recruitment numbers did not alter and the routine testing of personnel reduced the risk of HIV infection.³²⁵ Some initial turmoil existed when at least one high-ranking officer declared his homosexual orientation; however, once the officer explained that he felt compelled to reveal his true sexuality in order to maintain his integrity and stop "living a lie," the troops supported his position.³²⁶ This experience adds credence to the current allegation that the "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" law and policy is placing a strain on the United States soldier's commitment to the core value of integrity.

Nevertheless, Australia's removal of the ban may have had overall positive, rather than mere neutral, effects on military effectiveness and morale.³²⁷ The lifting of the military's ban created a greater pool of resources for competitive positions and eliminated the atmosphere of "witch hunts" to "out" homosexuals.³²⁸

D. Israel

Unlike most other nations, Israel never had a formal policy that banned homosexuals from military service.³²⁹ In 1983, the Israeli Defense Forces adopted regulations that permitted homosexuals to serve, but excluded them from intelligence positions.³³⁰ The exclusion of homo-

MORE EVENING SUN, Jan. 28, 1993, at 12A; Deb Price, *Gays in Military Succeeds Abroad*, DETROIT NEWS, Feb. 19, 2001, at Opinion9; Lincoln Wright, *US Study Backs Gays in Military*, CANBERRA TIMES, Sept. 21, 2000, at A3; see also NAT'L SEC. & INT'L AFFAIRS DIV., U.S. GEN. ACCOUNTING OFFICE, *supra* note 261, at 19.

325. See BELKIN & McNICHOL, UNIV. OF CAL. AT SANTA BARBARA, AUSTRALIA REPORT, *supra* note 319, at § V(A)-(B); see also *Gay Troops in Europe*, N.Y. TIMES, Jan. 15, 2000, at A16; Damien Murphy, *Gay Military Recruits Subject of US Study*, SYDNEY MORNING HERALD, Sept. 21, 2000, at 3.

326. See BELKIN & McNICHOL, UNIV. OF CAL. AT SANTA BARBARA, AUSTRALIA REPORT, *supra* note 319, at § V(B).

327. See *id.* at § V(C) (stating Human Rights Commissioner Chris Sidoti's opinion that lifting the ban had a positive effect).

328. See *id.*

329. See AARON BELKIN & MELISSA LEVIT, UNIV. OF CAL. AT SANTA BARBARA, EFFECTS OF LIFTING OF RESTRICTIONS ON GAY AND LESBIAN SERVICE IN THE ISRAELI FORCES: APPRAISING THE EVIDENCE § I (2000), at http://www.gaymilitary.ucsb.edu/israel_pub.htm (June 2000) [hereinafter BELKIN & LEVIT, UNIV. OF CAL. AT SANTA BARBARA, ISRAEL REPORT]; NAT'L SEC. & INT'L AFFAIRS DIV., U.S. GEN. ACCOUNTING OFFICE, *supra* note 261, at 38; POND, GEORGETOWN UNIV. LAW CTR., *supra* note 52, at 42 (citing to *Israel Army Denies Gay Discrimination*, TORONTO STAR, Feb. 8, 1993, at A12).

330. See BELKIN & LEVIT, UNIV. OF CAL. AT SANTA BARBARA, ISRAEL REPORT, *supra* note 329, at § I; NAT'L DEF. RESEARCH INST., RAND, *supra* note 30, at 87 (mandating special requirements for homosexual soldiers, including separation from the military or

sexuals from intelligence positions, however, was not practiced.³³¹ In 1993, Israel abolished these security restrictions.³³²

As for the justification of increased sexual tension, Israeli soldiers report that homosexual soldiers are just as successful at controlling their sexual urges as heterosexual soldiers who are living in coed quarters.³³³ The acceptance of homosexuals in their ranks had no adverse effect on unit cohesion, morale or effectiveness,³³⁴ and the Israeli Defense Forces are "considered to be one of the premiere fighting forces in the world."³³⁵ This data illustrates that the United States' concern for its military becoming second-rate and mediocre by including homosexuals in its community is without merit. This lack of negative effects from lifting a ban on homosexuals serving openly has also been shown in other countries.

E. Other Countries

Spain's Army banned homosexuality because it violated military honor.³³⁶ The Spanish Army abolished its code in 1985, when gays were

restrictions on possible assignments, due to the belief that homosexuals were potential security risks); David Hoffman, *Screening Can Limit Careers*, WASH. POST, Nov. 30, 1992, at A08; see also NAT'L SEC. & INT'L AFFAIRS DIV., U.S. GEN. ACCOUNTING OFFICE, *supra* note 261, at 40-41.

331. See BELKIN & LEVIT, UNIV. OF CAL. AT SANTA BARBARA, ISRAEL REPORT, *supra* note 329, at § I; NAT'L SEC. & INT'L AFFAIRS DIV., U.S. GEN. ACCOUNTING OFFICE, *supra* note 261, at 40; POND, GEORGETOWN UNIV. LAW CTR., *supra* note 52, at 42-44 (analyzing the argument that there is a *de facto* ban, although there is a lack of evidence proving discrimination since all security clearances require individually administered psychological tests). But see NAT'L SEC. & INT'L AFFAIRS DIV., U.S. GEN. ACCOUNTING OFFICE, *supra* note 261, at 41-42 (disclosing one case where an officer was summarily discharged from his intelligence unit because he revealed his homosexual orientation); Hoffman, *supra* note 330 (relating the restrictions were not uniformly exercised and a soldier could hold high ranking positions, yet be passed over for a key promotion because he was a homosexual).

332. See BELKIN & LEVIT, UNIV. OF CAL. AT SANTA BARBARA, ISRAEL REPORT, *supra* note 329, at § I; NAT'L DEF. RESEARCH INST., RAND, *supra* note 30, at 87 (removing on June 11, 1993, all restrictions imposed on homosexual military and civilian members); NAT'L SEC. & INT'L AFFAIRS DIV., U.S. GEN. ACCOUNTING OFFICE, *supra* note 261, at 41; *Israel Formalizes Policy of Drafting Gays*, CHI. TRIB., June 12, 1993, at 17.

333. See NAT'L SEC. & INT'L AFFAIRS DIV., U.S. GEN. ACCOUNTING OFFICE, *supra* note 261, at 42.

334. See *id.* at 43; POND, GEORGETOWN UNIV. LAW CTR., *supra* note 52, at 44-45.

335. BELKIN & LEVIT, UNIV. OF CAL. AT SANTA BARBARA, ISRAEL REPORT, *supra* note 329, at § II; see NAT'L DEF. RESEARCH INST., RAND, *supra* note 30, at 85 (noting Israel has fought four large wars since 1948 and is considered to have combat experience superior to any other country in the world); POND, GEORGETOWN UNIV. LAW CTR., *supra* note 52, at 42 (describing Israel as one of the most tested and effective militaries in the world).

336. See *Senior Spanish Army Officer Reveals Homosexuality*, AGENCE FRANCE-PRESSE, Sept. 3, 2000, at International News.

openly accepted into the Spanish Armed Forces.³³⁷ By September 2000, homosexuals had been fully integrated into Spain's Armed Forces.³³⁸ Although it is too early to assess any effects from Spain's policy change, no adverse consequences have been reported as of the publication of this comment.

Germany has also accepted the position that homosexuality should not dictate the level of responsibility or status given to its military members.³³⁹ These nations' homosexual policies show the international trend toward allowing homosexuals to serve openly in the military and the lack of adverse effects despite numerous former justifications for restrictions on homosexuals' roles.

VI. PROPOSAL

A. *We Are Ripe for Change*

In light of all the foreign countries' experiences with homosexual integration into the military, the United States needs to admit a homosexual has the ability to serve as well as any other member of the Armed Forces.³⁴⁰ Senator Sam Nunn, Chairman of the Senate Committee on Armed Services and a strong opponent against allowing homosexuals to serve in the military, even admits, "I have no doubt that homosexuals have served and are today serving in our Armed Forces with distinction, and many times with courage and valor."³⁴¹

337. *See id.*

338. *See Zero Tolerance*, TIMES (London), Sept. 4, 2000, at Overseas News (referring to the September 2000 issue of *Zero*, a gay magazine, that featured Lieutenant Colonel Sanchez).

339. *See Gay Army Officer Receives Backing from Government*, RECORD (N.N.J.), Sept. 1, 2000, at A23; *Germany Says Treat Gays the Same*, ASSOCIATED PRESS ONLINE, Aug. 31, 2000, available at 2000 WL 25992674; *World in Brief: Germany Rejects Action Against Gay Soldier*, ATLANTA J. & CONST., Sept. 1, 2000, at 6B (describing a case where the German government held a German officer was unjustly reassigned to a desk job from a platoon leader position after an investigation concluded he was gay).

340. *See Symposium, Queer Law 1999: Current Issues in Lesbian, Gay, Bisexual and Transgendered Law*, 27 FORDHAM URB. L.J. 279, 308 (1999) (describing how the courts seem incapable of agreeing that the question is not about the ability of homosexuals to be good soldiers, but about other people's attitudes toward homosexuals); *see also* Sherwood & Camire, *supra* note 46 (quoting Arizona Congressman Jim Kolbe as stating, "Service to your nation has zilch to do with gender preference").

341. 139 CONG. REC. 1372 (1993); *see also* Remarks in the "CBS This Morning" Town Meeting, May 27, 1993, 1 PUB. PAPERS 756 (1993) (presenting President Clinton's acknowledgment that homosexuals have always been in the military).

Homosexuals have proven to be exemplary workers and are disciplined military members.³⁴² Captain Philip Adams, United States Marine Corps Reserve, said it best when he asked, "Does that [being a distinguishable gay or lesbian] make us bad or less effective, or does it simply offend a small number of bigoted, narrow-minded, hate-oriented servicemembers who adversely affect the morale of all military personnel?"³⁴³

Society's tolerance of homosexuals was present when President Clinton called for a change in the military's policy in 1993.³⁴⁴ President Clinton stated:

The issue is not whether there should be homosexuals in the military. Everyone concedes that there are. The issue is whether men and women who can and have served with real distinction should be excluded from military service solely on the basis of their [sexual] status. . . . [I]ndividuals who are prepared to accept all necessary restrictions on their behavior, many of which would be intolerable in civilian society, should be able to serve their country honorably and well.³⁴⁵

Since the inception of the "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" law and policy in 1993, public attitude toward homosexuals has changed.³⁴⁶ In July 2000, Vermont statutorily allowed same-sex couples to obtain civil union licenses, spurred by the interpretation of the Vermont Constitution in *Baker v. State*, which held same-sex couples were entitled to the corresponding statutory benefits and protections as those

342. See, e.g., *Cammermeyer v. Perry*, 97 F.3d 1235, 1236 (9th Cir. 1996) (stating Cammermeyer was highly decorated, awarded the Bronze Star for distinguished service during the Vietnam conflict and served as Chief Nurse at numerous military hospitals); *Eltz v. Aspin*, 897 F. Supp. 1, 1-2 (D.D.C. 1995) (recognizing that the admitted homosexual was "the epitome of the hardworking, dedicated, disciplined, capable and professional Marine" and goes on to state his many commendations and superior service including "Marine of the Year"); *McVeigh v. Cohen*, 983 F. Supp. 215, 217 (D.D.C. 1998) (mentioning the highly decorated, honorable and lengthy career of a homosexual servicemember).

343. 139 CONG. REC. 7918 (1993) (quoting an article titled "Gays in the Military: We Are Here to Stay"); see also 139 CONG. REC. 13,517 (1993).

344. See The President's News Conference, January 29, 1993, *supra* note 81, at 20.

345. *Id.*

346. *Compare Shades of Gay: With AIDS No Longer an All-Consuming Crises, the Battle for Tolerance Has Moved to Schools, Churches, Offices and the Frontiers of Family Life*, NEWSWEEK, Mar. 20, 2000, at 46 (relating the results of a recent poll where only 35% of the public opposes allowing homosexuals to serve openly in the military), with Warden, *supra* note 315 (compiling survey results showing 60% of the American public feels homosexuals should be allowed to serve in the military). See generally NAT'L DEF. RESEARCH INST., RAND, *supra* note 30, at xxi (presenting poll results of 21% believing homosexuals should not serve under any conditions).

afforded to opposite-sex married couples.³⁴⁷ Twelve states, including Vermont, have sexual orientation codified into anti-discrimination statutes.³⁴⁸

Another trend toward homosexual acceptance is shown by proposed modifications to the Federal Hate Crimes Bill, which would include a victim's sexual orientation on the same level as sex, disability, race, religion, color or national origin for increased criminal penalties.³⁴⁹ Despite this evolving social climate, changes to the homosexual policy will not happen effortlessly.³⁵⁰

A major obstacle to overcome is that the United States does not have a ruling by a court of law that condemns the military's anti-homosexual conduct policy as unjust; such a ruling would jump-start a change. In both Canada and the United Kingdom, a court of law decided the ban on homosexuals in the military was wrong, and the countries were forced to change their guidelines based on these rulings.³⁵¹

The United States' courts are extremely reluctant to critique military policies, because they feel the military is under the exclusive control of

347. See *Baker v. State*, 744 A.2d 864, 867 (Vt. 1999); Shannon P. Duffy, *Pushing the States on Gay Unions: Vermont Law Will Lead to Suits Elsewhere*, *Advocates Say*, NAT'L L.J., Dec. 4, 2000, at A1.

348. See *U.S. Civil Rights Laws Don't Protect Gays, Court Rules*, ST. LOUIS POST-DISPATCH, Mar. 30, 2001, at A6; see also Duffy, *supra* note 347. These twelve states include California, Connecticut, Hawaii, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, Oregon, Rhode Island, Vermont and Wisconsin. See *U.S. Civil Rights Laws Don't Protect Gays, Court Rules*, *supra*; NAT'L DEF. RESEARCH INST., RAND, *supra* note 30, at 463.

349. See *Rep. Berkley Urges Congress to Pass Hate Crimes Bill*, LAS VEGAS SUN, Jan. 6, 2000, available at <http://www.lasvegassun.com/sunbin/stories/text/2000/jan/06/509680399.html>. Representative Berkley stated, "Our society must have zero tolerance for crimes perpetuated against a group for the simple reason that they are different." *Id.* A powerful quote by Martin Niemöller, a German minister who opposed Hitler and spent seven years in a concentration camp, embodies the rationale for this bill:

First they came for the Socialists. And I did not speak because I was not a Socialist. Then they came for the trade unionists. And I did not speak because I was not a trade unionist. Then they came for the Jews. And I did not speak because I was not a Jew. And then they came for me and there was no one left to speak for me.

Id.

350. An analogy to the potential implementation problems can be seen by examining the integration of African Americans into the United States Armed Forces. See NAT'L DEF. RESEARCH INST., RAND, *supra* note 30, at 188-89. To formulate an effective change in law and policy there must be strong leadership supporting and informing subordinates to comply with the changes, prompt discipline action for non-compliance and a focus on altering opponents' behavior rather than their personal attitudes toward homosexuals. See *id.*

351. See *Lustig-Prean & Beckett v. United Kingdom*, 29 Eur. Ct. H.R. 548 (1999); *Smith & Grady v. United Kingdom*, 29 Eur. Ct. H.R. 493 (1999).

the Executive and Legislative branches of government.³⁵² For example, the United States Supreme Court has refused to review at least four cases on the "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" law and policy.³⁵³ Courts are extremely wary of upsetting such a "carefully crafted national political compromise, one that was the product of sustained and delicate negotiations involving both the Executive and Legislative branches of our government."³⁵⁴ The judiciary consistently holds the Constitution clearly states Congress and the President have the prevailing power over the Armed Forces.³⁵⁵ Therefore, courts defer to Congressional decisions on matters of military discipline and morale.³⁵⁶ Due to the judiciary's respect for this separation of powers doctrine, change must come from Congress rather than the military, the courts or the President.³⁵⁷

B. Option 1: Repeal the Homosexual Policy, Amend the Sodomy Law and Require Equal Enforcement

The first option to change the anti-homosexual law and policy would be for the Legislative branch to repeal Title 10, Section 654 of the United States Code and apply military laws equally, regardless of sexual orientation. Congress should review its current law and initiate new legislation that would repeal Title 10, Section 654 of the United States Code, allowing homosexuals to serve openly in the military.

352. See *Thomasson v. Perry*, 80 F.3d 915, 921 (4th Cir. 1996).

353. See Julia Adams, *United States Supreme Court Declines to Hear Case Challenging Military's Gay Policy*, Jan. 11, 1999, at http://www.sldn.org/scripts/sldn.ix?pr_01_11_99 (on file with author). The United States Supreme Court denied petitions for writ of certiorari by Army First Lieutenant Andrew Holmes and Navy Lieutenant Richard Watson, Navy Lieutenant Tracy Thorne, Navy Lieutenant Junior Grade Richard Selland, Air Force Captain Richard Richenberg and Navy Lieutenant Paul Thomasson. See *Holmes v. Cal. Army Nat'l Guard*, 525 U.S. 1067 (1999); *Thorne v. Dep't of Def.*, 525 U.S. 947 (1998); *Selland v. Cohen*, 520 U.S. 1210 (1997); *Richenberg v. Cohen*, 522 U.S. 807 (1997); *Thomasson v. Perry*, 519 U.S. 948 (1996). Adams' article also mentions a denied writ of certiorari for Navy Petty Officer Marc Phillips, but the actual request for writ could not be found. See Adams, *supra*.

354. *Thomasson*, 80 F.3d at 921.

355. See 139 CONG. REC. 1371 (1993) (explaining that article I, section 8 of the Constitution grants Congress the responsibility to "raise and support armies . . . to provide and maintain a Navy . . . [and] to make rules of the government and regulation of the land and naval forces").

356. See *Woodward v. United States*, 871 F.2d 1068, 1077 (Fed. Cir. 1989).

357. See Scarborough, *supra* note 318 (quoting President Clinton as predicting "that the next president, if he wants to change the policy, will have to get the Congress to change the law . . . I don't think that the military and the president have the authority to do it").

Simple repeal of the military's anti-homosexual policy may not be enough, however. "It is not a 'crime to be a homosexual,'"³⁵⁸ and the military does not treat it as such, because it implements the discharge of homosexuals under administrative policy rather than the Uniform Code of Military Justice. Sodomy (which includes homosexual acts), however, is a crime under the Uniform Code of Military Justice.³⁵⁹ In order to allow homosexuals to serve openly and without consequence, the sodomy restrictions will need to be rewritten to permit the act between consenting adults.³⁶⁰ Full integration can only be achieved with this additional modification to the criminal codes, which are laws passed by Congress. Even though the President is the Commander-in-Chief of our Armed Forces, he cannot change the laws, but only change the policy that enacts those laws.³⁶¹

In addition, any harassment or improper conduct on the part of heterosexual or homosexual members should be dealt with equally.³⁶² No special status should be granted for sexual orientation. If a heterosexual male soldier makes unwanted sexual advances toward a female soldier, or if a homosexual male soldier makes unwanted sexual advances toward a fellow male soldier, the perpetrators should be treated exactly the same.

C. *Option 2: Repeal the Homosexual Policy and Require Equal Enforcement*

Another alternative toward full acceptance of homosexuals in the United States military would be to repeal U.S.C. title 10, section 654, but maintain the sodomy laws as written. This will ensure the Department of Defense truly only punishes servicemembers for unlawful conduct, and not because of an ambiguous policy.³⁶³ The military will need to regulate any inappropriate behavior with strict enforcement of the Uniform Code

358. *Elzie v. Aspin*, 897 F. Supp. 1, 5 n.10 (D.D.C. 1995) (citing to *Gay Student Servs. v. Tex. A & M Univ.*, 737 F.2d 1317, 1328 (5th Cir. 1984)).

359. See 10 U.S.C. § 925 (1994) (criminalizing sodomy for military members).

360. See Nat'l Def. Research Inst., RAND, *supra* note 30, at 37-38.

361. See U.S. CONST. art. I, § 8, cl. 14 (declaring "The Congress shall have Power . . . [14] To make Rules for the Government and Regulation of the land and naval Forces"); see also Schlueter, *supra* note 50, at 401; Jane McHugh, *Panel: Bring Military Law into 21st Century*, AIR FORCE TIMES, June 4, 2001, at 25 (clarifying "[o]nly Congress has the power to change the UCMJ").

362. See HALLEY, *supra* note 33, at 35 (reinforcing the proposition of the Uniform Code of Military Justice as an equal-handed method of punishing military crimes such as sodomy, sexual assault and rape).

363. See *House of Representatives Hearings*, *supra* note 49, at 5-6 (statement of Hon. Les Aspin, Sec'y of Def.) (stating how any policy would be ambiguous unless one adopts a stance that homosexuals are completely banned from the military or completely accepted); Remarks Announcing the New Policy on Homosexuals in the Military, July 19, 1993, *supra*

of Military Justice and ensure all military members are required to conform to the same standards.³⁶⁴ The existing sodomy laws are sufficient to cover improper homosexual and heterosexual behavior.³⁶⁵ There do not need to be separate regulations for homosexuals and heterosexuals, but simply an equal application of the standards to all servicemembers.³⁶⁶

By law, all military personnel are held to the standards of the Uniform Code of Military Justice, including restrictions on sodomy, conduct unbecoming an officer and gentleman and indecent acts.³⁶⁷ These codes are enforced even-handedly across the military and are as effective at discharging a member for homosexual conduct as the "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" law and policy. Following this clear and straightforward directive will alleviate the problems inherent in the ambiguity of the policy. The Uniform Code of Military Justice is very clear about what standards and conduct are punishable, and application of these criminal provisions by themselves would eliminate much of the ambiguity present in the current anti-homosexual law and policy. Due to the current vague and ambiguous nature of the policy itself, servicemembers are uncertain how to react and their leaders are uncertain how to enforce the military's position on homosexuals; once the ambiguity is eliminated, it might help prevent tragic deaths like Private Winchell's.

D. *Option 3: Amend the Homosexual Policy*

If elimination of the "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" law and policy would prove to be impossible within the current polit-

note 47, at 1110 (advancing the view that the current laws and rules already cover misconduct by homosexuals as well as heterosexuals).

364. See Bowley, *supra* note 265.

365. See *id.*; Schlueter, *supra* note 50, at 423.

366. See, e.g., *United States v. Fagg*, 34 M.J. 179, 179 (C.M.A. 1992) (overturning a lower court's recognition of a "constitutional zone of privacy for heterosexual, noncommercial, private acts of oral sex between consenting adults"); *United States v. Henderson*, 34 M.J. 174, 176-78 (C.M.A. 1992) (holding that consensual heterosexual fellatio is a criminal act of sodomy under the Uniform Code of Military Justice). But see *United States v. Thompson*, 47 M.J. 378, 379 (C.A.A.F. 1997) (hinting at a possible exception to sodomy convictions when there is consensual sodomy between an adult married couple which raises a constitutional right to privacy involving the interests of furthering and supporting a marital relationship); John P. Einwechter, *New Developments in Substantive Criminal Law Under the Uniform Code of Military Justice* (1997), 1998-APR ARMY LAW. 20, 26 n.66 (1998).

367. See 10 U.S.C. § 925 (1994) (criminalizing sodomy in the military); 10 U.S.C. § 933 (1994) (criminalizing conduct unbecoming an officer and gentleman); 10 U.S.C. § 934 (1994) (criminalizing indecent acts in the military).

ical environment.³⁶⁸ an amendment of this policy should be enacted that actually allows a servicemember to rebut the presumption of homosexual conduct that arises upon declaring one's homosexuality. This amendment would, in effect, remove the homosexual statement clause³⁶⁹ (the "Don't Tell" element) from the law and require the government to prove actual homosexual *conduct*, not just homosexual *orientation*, before discharging an alleged homosexual.

A similar result could be achieved if the Department of Defense issued new policy guidelines. These guidelines would need to detail the evidence sufficient to successfully rebut the presumption of propensity.³⁷⁰ The policy as currently written allows the introduction of any relevant evidence to rebut the propensity presumption once a servicemember has made a homosexual statement.³⁷¹ Upon introduction of such evidence showing the member's character, credibility or past actions, however, the courts have held that the presumption is not rebutted and the military members have been discharged.³⁷²

The Department of Defense Directives and Instructions need to specify the evidence that successfully rebuts the presumption in more detail, such as allowing servicemembers who profess their celibacy and truthfully deny having engaged in homosexual acts since joining the military to remain on duty. Only once servicemembers' rebuttals are given due deference will the policy be implemented the way it was intended.³⁷³

368. See *Crawley*, *supra* note 207 (reporting the current Secretary of Defense and President of the United States support the "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" law and policy).

369. See 10 U.S.C. § 654(b)(2) (1994).

370. In the "Don't Ask, Don't Tell" law, Congress dictates the Department of Defense must promulgate regulations which detail procedures for rebutting the propensity presumption. See *id.*

371. See DEP'T OF DEF. DIRECTIVE NO. 1332.14, *supra* note 88, at § E3.A1.1.8.1.2 2.1-.5 (listing possible, but not exhaustive, evidence as: past homosexual acts, credibility, character and the nature and circumstances surrounding the homosexual statement).

372. See, e.g., *Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996); *Meinhold v. United States Dep't of Def.*, 34 F.3d 1469 (9th Cir. 1994); *Thorne v. United States Dep't of Def.*, 945 F. Supp. 924 (E.D. Va. 1996), *aff'd*, 139 F.3d 893 (4th Cir. 1998); *Holmes v. Cal. Army Nat'l Guard*, 920 F. Supp. 1510 (N.D. Cal. 1996), *rev'd*, 124 F.3d 1126 (9th Cir. 1997).

373. See Remarks on the Dismissal of FBI Director William Sessions and an Exchange with Reporters, July 19, 1993, 1 PUB. PAPERS 1113 (1993). President Clinton answered a question about the ability of homosexual servicemembers to "come out of the closet" under the "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" law and policy by saying.

No, it will not necessarily require them to stay in the closet. The policy as written gives people a limited right, obviously, to express their sexual orientation. But if they do so, they are at risk of having to demonstrate in some credible way that they are observing the rules of conduct applied in the military service.

Id.

Also, the Department of Defense should specify qualifications that would allow servicemembers with outstanding records to remain in the military under the exception to the "Don't Ask, Don't Tell" law that maintains separation is not mandatory if retention is in the best interest of the military.³⁷⁴ A recent case in point involves Army Reserve Lieutenant and Arizona State Representative Steve May's homosexual statement that did not result in mandatory separation.³⁷⁵

Representative May acknowledged he was gay during a legislative debate in February 1999.³⁷⁶ The Army subsequently found Representative May had violated the "Don't Ask, Don't Tell" law and took actions to discharge him.³⁷⁷ Representative May fought the proceedings and in January 2001, with the intervention of the White House, the Army dropped the discharge action; this was the first time the Army had dropped the dismissal action against a homosexual servicemember.³⁷⁸ The Army's disclosed reason for dropping the discharge action was that Representative May had agreed not to re-enlist when his current service commitment expired in May 2001.³⁷⁹

There is no current provision that allows homosexuals to finish serving their term if the discharge is approved close to the end of their commitment, unless the military acknowledges retention would be in the best interest of the military.³⁸⁰ Since Representative May had an outstanding

374. See generally 10 U.S.C. § 654(e)(2) (codifying the best interest exception).

375. See Howard Fischer, *Army Agrees to Let Gay Legislator Finish Serving in Reserves*, ARIZ. DAILY STAR, Jan. 16, 2001, at A1; Robbie Sherwood, *Rep. May Leaving Army His Way*, ARIZ. REPUBLIC, Apr. 11, 2001, at A1; Mark R. Kerr & PlanetOut News Staff, *U.S. Army Drops Steve May Case*, Jan. 16, 2001, at <http://www.planetout.com/news/article.html?2001/01/16/2> (on file with author).

376. See Fischer, *supra* note 375; Sherwood, *supra* note 375 (reporting Representative May also spoke about his homosexuality to *Newsweek*, *60 Minutes* and during nationwide speaking engagements); Kerr & PlanetOut News Staff, *supra* note 375 (explaining the legislative bill was a proposal to ban local government agencies from offering benefits to domestic partners of homosexual employees).

377. See Fischer, *supra* note 375; Kerr & PlanetOut News Staff, *supra* note 375.

378. See Fischer, *supra* note 375; Sherwood, *supra* note 375 (revealing the Army had never dropped a homosexual dismissal action before); Kerr & PlanetOut News Staff, *supra* note 375 (quoting Representative May, "Never before has the military ever dropped a case of 'Don't Ask, Don't Tell' and allowed a soldier to serve the remainder of their term").

379. See *Army Won't Dismiss Gay Reservist*, WASH. POST, Jan. 16, 2001, at A22; Fischer, *supra* note 375 (recounting the statements of an Army spokesman that the Army was not admitting fault, Representative May did violate "Don't Ask, Don't Tell" and the discharge was dropped because of May's agreement not to re-enlist); Sherwood, *supra* note 375. But see Kerr & PlanetOut News Staff, *supra* note 375 (asserting the Army failed to present an official reason for dismissing the separation procedures).

380. See generally 10 U.S.C. § 654 (1994) (detailing the "Don't Ask, Don't Tell" law and exceptions); DEP'T OF DEF. DIRECTIVE NO. 1332.14, *supra* note 88 (providing additional policy guidance for homosexual discharges).

service record, the best interest of the military would also be served by allowing him, and other exemplary homosexual servicemembers whose statements do not affect their unit's morale or cohesion, to remain on duty.³⁸¹

VII. CONCLUSION

Opponents to altering the military's anti-homosexual law and policy may argue the justifications for "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" are valid reasons for banning homosexuals from openly serving in the military. They are wrong. With the confusion over the proper interpretation of homosexual acts and the creation of a presumption of propensity to commit homosexual acts without requiring proof, there are some inappropriate applications of the policy. Additionally, the prohibition against homosexual statements (stating "I am gay") implicitly violates the military's core value of integrity, since not revealing who you truly are could be considered lying. Even the simplest questions could force military members to lie about their weekend plans or implicitly admit to homosexuality by a refusal to answer.

The increase in discharges for homosexuality after the implementation of the "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" law and policy, which was supposed to allow more homosexuals to serve, supports the truth that there is ambiguity in the policy. Additional proof that the justifications for "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" are outdated can be seen by comparing them to those previously used by foreign countries or those used by the United States to ban African Americans from the military. In all cases, desegregation did not adversely affect unit cohesion, morale, discipline or health. When foreign militaries lifted the ban on homosexuals, they found no adverse impacts on their unit cohesion, morale, teamwork, anti-harassment policy, recruitment or retention.³⁸² Even the worry of blatant opposition to the new

381. See Fischer, *supra* note 375 (debating whether the precedence of this case will allow military commanders to retain more homosexual servicemembers); Sherwood, *supra* note 375 (describing Representative May's service record as spotless and filled with honor and distinction); Kerr & PlanetOut News Staff, *supra* note 375 (describing Representative May as admired by his troops and one of the Army's best and brightest).

382. See NAT'L DEF. RESEARCH INST., RAND, *supra* note 30, at 103-05; POND, GEORGETOWN UNIV. LAW CTR., *supra* note 52, at 93; see also BELKIN & McNICHOL, UNIV. OF CAL. AT SANTA BARBARA, CANADA REPORT, *supra* note 286, at § VII(A)(2)-(4); BELKIN & McNICHOL, UNIV. OF CAL. AT SANTA BARBARA, AUSTRALIA REPORT, *supra* note 319, at § II; NAT'L SEC. & INT'L AFFAIRS DIV., U.S. GEN. ACCOUNTING OFFICE, *supra* note 261, at 43; NEWTON, MINISTRY OF DEF., *supra* note 52.

policies was unfounded, although initial surveys illustrated that nearly half of all soldiers would resist serving with homosexuals.³⁸³

While Great Britain, Canada, Australia, France, Spain, Germany and Israel have acknowledged the changing social climate and eliminated the ban on homosexuals serving in their Armed Forces, America has tip-toed around its current policy, which unjustly maintains the underlying belief that homosexuality is incompatible with military service.³⁸⁴ As these foreign countries have proven, it is not the soldiers' sexual orientation that matters, but whether they are committed to the primary goal of national defense.³⁸⁵ It is this commitment that should be the focus in any decision on whether or not the law and policy should be changed.

With any change in the law or policy, an emphasis on zero tolerance for harassment will be necessary, along with strong support from all military leaders.³⁸⁶ Senior leaders are the ones who are looked to for guidance, supervision and appropriate behavior.³⁸⁷ The senior leadership must support the policy, as it is their job to do; once this happens, the subordinate troops will naturally follow. Studies on the impact of homosexual integration on unit performance show that, as long as commanders support the new policy, the subordinate troops must tolerate opposing beliefs.³⁸⁸ Similarly, independent surveys have found that military officers are even more tolerant of opposing views than their civilian counterparts.³⁸⁹

383. See BELKIN & EVANS, UNIV. OF CAL. AT SANTA BARBARA, UNITED KINGDOM REPORT, *supra* note 52, at 4; BELKIN & McNICHOL, UNIV. OF CAL. AT SANTA BARBARA, CANADA REPORT, *supra* note 286, at § I; BELKIN & McNICHOL, UNIV. OF CAL. AT SANTA BARBARA, AUSTRALIA REPORT, *supra* note 319, at § I; BELKIN & LEVIT, UNIV. OF CAL. AT SANTA BARBARA, ISRAEL REPORT, *supra* note 329, at § I.

384. See *No Defense for 'Don't Ask' Policy*, *supra* note 113; see also BELKIN & McNICHOL, UNIV. OF CAL. AT SANTA BARBARA, CANADA REPORT, *supra* note 286; BELKIN & McNICHOL, UNIV. OF CAL. AT SANTA BARBARA, AUSTRALIA REPORT, *supra* note 319; BELKIN & LEVIT, UNIV. OF CAL. AT SANTA BARBARA, ISRAEL REPORT, *supra* note 329.

385. See *Gays Should Serve Openly*, *supra* note 253.

386. See Office of the Inspector Gen., Dep't of Def., *supra* note 118, at 12, 18 (referencing statistics from a survey of servicemembers; the survey identified enlisted members as performing 71% of homosexual harassment and officers accounting for 9%).

387. See FORT CAMPBELL TASK FORCE, DEP'T OF THE ARMY INSPECTOR GEN., *supra* note 2, at 2-35 (observing "this is a commander's program and can only be successful through the direct and positive involvement of leaders at every level").

388. See Coit Blacker & Lawrence J. Korb, *Military Tolerance Works*, N.Y. TIMES, Jan. 13, 2000, at A33, available at http://www.gaymilitary.ucsb.edu/news1_13_00.htm; see also Ricks, *supra* note 13.

389. See Peter D. Feaver & Richard H. Kohn, *The Gap: Soldiers, Civilians and Their Mutual Misunderstanding*, 2000 NAT'L INTEREST 3 (referring to a study conducted that showed 82% of military officers approved of pro-homosexuality books being available in public libraries).

It must be kept in mind that, in reality, the response to a repeal of the homosexual ban will run the gambit of possible scenarios—the military is just like any other large group of people, where each member has his or her own background, experiences and feelings concerning serving with homosexuals, and each person's reaction to the change in policy may be different.³⁹⁰ If other countries' experiences with full integration of homosexuals into their militaries are any indication of what will happen in the United States, this law and policy modification will not have any adverse impacts, and the current justifications will be proven unfounded.³⁹¹

The complete integration of homosexuals into the United States military is the only way to treat all soldiers truly equally. When this integration finally occurs, military members will be able to view firsthand that job performance and professionalism are not dependent upon one's sex-

390. See GUTMANN, *supra* note 195, at 194.

391. At least there will not be issues of unit cohesion, morale or discipline, but there will be several implementation issues.

Once homosexuals are allowed to serve openly in the military, the issue of proper lodging will need to be decided. As other countries have done, the best option is to maintain separate facilities based on gender. See BELKIN & EVANS, UNIV. OF CAL. AT SANTA BARBARA, UNITED KINGDOM REPORT, *supra* note 52, at 38-39; BELKIN & McNICHOL, UNIV. OF CAL. AT SANTA BARBARA, CANADA REPORT, *supra* note 286, at § V. But see Editorial, *No Room in the Military for Homosexuals*, ST. LOUIS POST-DISPATCH, Apr. 1, 1995, at 15B. It would simply be a problem that will need to be corrected later, much like the problems found with the gradual integration of African Americans, if initially homosexuals are lodged in separate facilities or separated into their own companies. It will not be true integration if homosexual servicemembers are set apart or treated differently than other soldiers, especially since there are some gay and lesbian members already serving.

After all the military regulations apply equally to homosexuals and heterosexuals, the next hurdle will be to obtain equal benefits for the dependents of military members, regardless of their sexual orientation. See BELKIN & EVANS, UNIV. OF CAL. AT SANTA BARBARA, UNITED KINGDOM REPORT, *supra* note 52, at 51-52; BELKIN & McNICHOL, UNIV. OF CAL. AT SANTA BARBARA, CANADA REPORT, *supra* note 286, at § VI(B). An introduction to the numerous military benefits available to servicemembers' dependents can be found in Schlueter, *supra* note 50, at 420-21. Just as the United Kingdom, Canada and Australia are currently wrestling with the proper method of allocating medical and dental benefits to same-sex couples, the United States will have to consider adopting a policy that will allow military dependents to obtain the same services as their heterosexual counterparts. See Jon ben Asher, *U.K. Military To Grant Partner Benefits?*, Aug. 13, 2001, at <http://www.planetout.com/pno/news/article.html?2001/08/13/2> (on file with author).

As Professor David Schlueter testified at the Senate Hearings in 1993, all of these implementation issues will beg the question, "Where do you draw the line?" Maria Puente, *Nunn Sees Problems 'In Every Direction.'* USA TODAY, Mar. 30, 1993, at 6A. The interlocking military law, constitutional issues and competing interests all form a complicated "legal Rubik's Cube" that generates problems with every aspect of implementation. See *Senate Hearings*, *supra* note 31, at 95 (statement of Professor David A. Schlueter, Sch. of Law, St. Mary's Univ.); Schlueter, *supra* note 50, at 394-95; Puente, *supra*.

ual orientation,³⁹² and only then will tragedies like Winchell's death be avoided.

392. See, e.g., *Cammermeyer v. Perry*, 97 F.3d 1235, 1236 (9th Cir. 1996); *McVeigh v. Cohen*, 983 F. Supp. 215, 217-18 (D.D.C. 1998); *Elzie v. Aspin*, 897 F. Supp. 1, 1-3 (D.D.C. 1995) (showing the exceptional service of homosexual military members whose only justification for discharge was homosexual conduct).